155-527

155-328

Office Supreme Court, U. S.
FILED.
SEP 26 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

In the Matter

of

The Petition of THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY for a Writ of Prohibition

to

THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

RETURN TO ORDER TO SHOW CAUSE.

The Evening Post Job Printing House, New York.

Supreme Court of the United States. 1

In the Matter

of

The Petition of The New York and Porto Rico Steamship Company.

To the Supreme Court of the United States: 2

In obedience to the order of the Supreme Court in the above entitled matter dated April 30, 1894, requiring the undersigned as Judge of the District Court for the Southern District of New York to show cause why a writ of prohibition should not be granted, as prayed for in the petition of the above named petitioner to the Supreme Court, sworn to on the 16th day of April, 1894, the undersigned respectfully submits:

That the order and the citation to make the New York and Porto Rico Steamship Company a party defendant were issued because in the libel it was alleged that the 3
damage to the sugars in question arose from different alleged acts of negligence, for some of which, if established, it appeared by the petition of the owners of the *Centurion* that the New York and Porto Rico Company would be primarily liable and bound to indemnify the shipowners, and for other of said acts of negligence, if proved, the ship would be primarily liable; and that the presence of the

4 last named company as a party to the suit was necessary to the due administration of justice in order to avoid a multiplicity of suits; to secure a complete hearing of the subject matter through the presence of all the parties interested; to obtain an adjudication which should do justice to each and be binding upon all; to avoid conflicting decisions to which separate suits would be liable through the different evidence likely to be produced in them when the parties were different, and thus to avoid any possible failure of justice through such causes and any discredit to the administration thereof; and because the case, though not within the letter, was deemed to be within the spirit of the 59th Rule of the Supreme Court in Admiralty, and because the order of this Court to bring in the said com-
5 pany as a defendant at once instead of requiring the owners of the *Centurion* to wait until after a judgment against them before filing an independent libel against the said company in case negligent stowage was established, was, in the absence of any express rule on the subject by the Supreme Court, deemed to be within the limits of the authority of this Court, as conferred by Section 918 of the Revised Statutes, whereby this Court is authorized "to regulate its own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings," and also as conferred by the 46th Rule of the Supreme Court in Admiralty authorizing the District Court in cases "not provided for by the previous rules" to regulate its practice "in such man-
6 ner as it shall deem most expedient for the due administration of justice in suits in Admiralty." Of these considerations a fuller statement has been given by this Court in the cases of the *Hudson*, 15 Fed. Rep., 162, and the *Alert*, 40 do., 836, to which reference is hereby respectfully made.

A further reason for the said order and citation was, that since the promulgation of the said 59th Rule, the constant resort to it in innumerable instances has been found in practice most useful in preventing abuses, and in general extremely satisfactory; and the occasional application of the rule to other cases of negligence or torts, closely analagous to those expressly covered by the 59th

Rule, has proved equally conducive to the most speedy 7
and satisfactory distribution of justice.

The motion to set aside the citation was denied for the above reasons, and because in the present instance no inconvenience to the said New York and Porto Rico Company was shown or even averred to be likely to arise, such as might lead the Court in its discretion to withhold the relief asked for by the defendant shipowners.

I further certify, that the following additional pleadings have been filed in said cause, viz., the claimants' answer to the libel, and the libelants' answer to the petition, copies of which are hereto annexed; and that on the argument of the motion to set aside the additional process, the substance of said claimants' answer was stated to the Court, as the answer to be filed; and that the New York 8
and Porto Rico Steamship Company has not answered, having been given by me until 20 days after the decision on this application for a writ of prohibition, in which to answer. All which is respectfully submitted.

New York, Sept. 24, 1894.

ADDISON BROWN,
U. S. Dist. Judge.

(Endorsed)—Supreme Court of the United States.—In the Matter of the Petition of The New York & Porto Rico S. S. Co.—Return to Supreme Court.

TO THE HONORABLE ADDISON BROWN, UNITED STATES 9
DISTRICT JUDGE, FOR THE SOUTHERN DISTRICT OF NEW YORK:

The answer of JOHN BLUMER & Co., claimants of the steamship *Centurion*, to the amended libel of the AMERICAN SUGAR REFINING COMPANY (with whom John B. Gossler was originally joined as party libelant) against said steamship, her tackle, apparel and furniture, and all persons intervening for their interest therein, respectfully shows to the Court as follows:

FIRST.—They admit that in the month of January, 1893, the *Centurion* sailed on a voyage from New York to

10 various ports in Porto Rico, and from thence to New York; but they have no knowledge or information sufficient to form a belief as to what cargo was shipped upon the said vessel during the said voyage, nor by whom the same was shipped, for the reason that upon the said voyage the vessel was under charter, and all the cargo matters were in the sole charge and control of the charterers, the New York and Porto Rico Steamship Company, who received cargo and gave bills of lading, signed by their own agents, for its transportation and delivery.

They admit that certain cargo, the ownership and amount of which is unknown to the claimants, was shipped at Ponce, Humacao, Arroyo, Guayanilla and San Juan, and that the said charterers, the New York and
11 Porto Rico Steamship Company, gave bills of lading, under which it was agreed that the said merchandise was to be carried and transported to New York upon certain terms and conditions and for a certain freight specified in the said bills of lading.

SECOND.—They have no knowledge or information sufficient to form a belief in relation to the matters contained in the second paragraph of the libel, and require proof thereof so far as material.

THIRD.—Claimants have no knowledge as to the manner or place of the stowage of said sugar, but they admit that certain hogsheads of molasses were stowed in the between decks on the said voyage, and that the vessel arrived in
12 New York on or about the 26th day of February, 1893.

They admit that certain sugar stowed in the lower No. 2 hold of said steamship was delivered in a damaged condition, but they are ignorant whether any portion of the said sugar was that specified in the libel, or whether that specified in the libel was on board; and they deny that any damage which the libelants may have suffered was owing to the careless, negligent or improper manner in which said cargo was stowed, or the want of proper care on the part of the master, officers or crew, or of the agent of said vessel, or of the persons employed by him.

They further deny that before the cargo was put on

board the steamer's hold and bilges were not properly 13
cleaned and prepared for the carriage of said cargo, or that her hatches between the molasses and sugar were not properly closed. They deny that during the voyage the officers and crew neglected to properly operate the pumps, or that a portion of the molasses which escaped from the hogsheads stowed in the between-decks, owing to perils of the sea which were experienced on the voyage, found its way into the lower hold and damaged the sugar in consequence of any alleged failure to operate the pumps. They have no knowledge whether the molasses which escaped from the between-decks as alleged, and the drainage from sugar collected in the lower hold, washed out a part of the sugar from the hogsheads and damaged the remainder; but they deny that, if such was the fact, 14
it arose from any defective condition of the hatches, pumps, bilges, sluiceways, decks, scuppers or other equipment or appurtenances of the ship, or to the failure or neglect of the officers and crew, or those in charge of her, to properly pump the vessel.

FOURTH.—They admit the matters contained in the fourth paragraph of the libel.

FIFTH.—They admit the matters contained in the fifth paragraph of the libel, except that all and singular the premises in the said libel are true, as to which they take issue.

SIXTH.—Further answering the said libel, the claimants 15
allege that at all the times mentioned the steamship *Centurion* was chartered to the New York and Porto Rico Steamship Company, a domestic corporation, under a charter of demise, a copy of which is annexed to the petition herein, which was heretofore filed, bringing in the said New York and Porto Rico Steamship Company as defendant in this issue. According to the said charter-party the charterers were bound to and did stow the said cargo on the voyage in question by its own servants, and discharged it at the port of destination by its own servants in such manner as was by it deemed fit and proper.

A supercargo accompanied the vessel on the voyage,

16 who overlooked and superintended stowage at the various ports of loading. The officers of the steamer took no part in the stowage and were not responsible therefor under the terms of the charter-party, all matters pertaining to the cargo being solely within the direction and control of the charterers and their agents.

The twenty first clause of the charter-party provided that no claim was to be made against the owners for loss of cargo. The vessel was delivered to the charterers in a clean and seaworthy condition, in all respects fit for cargo, and, upon information and belief, they allege that she was in the same condition when the cargo in question was taken on board.

Upon the voyage in question the vessel experienced
17 storms and gales of unusual severity, causing the vessel to roll heavily, to shift her cargo and take a list, which she had until arrival in New York. During the said heavy weather, and by reason of the stress thereof, the molasses, which, upon information and belief, claimants say was properly stowed in the between decks, shifted, and some of the hogsheads broke up, in consequence of which their contents overflowed the pipes provided for ordinary drainage and accumulated in the lower No. 2 hold and in the bilges thereof, where, having become mixed with the natural drainage from the sugar, it settled and solidified above the level of the sluices leading into the engine room, in consequence of which it was impossible to relieve the accumulation with the pumps.

18 Claimants thereupon deny that the loss in question is ascribable to any act or ommision for which the vessel or her owners are liable, but should be ascribed to perils of the sea; and, in the alternative, they allege that if there was any neglect or default on the part of those engaged in or about the stowage, care or delivery of the cargo, as to which they have no knowledge, such neglect or default was on the part of the said charterers, their agents or servants, for which the claimants and the said steamship should not be held responsible.

SEVENTH.—Claimants further aver that the bills of lading issued for the said cargo were upon a printed form,

entitled "New York and Porto Rico Steamship Company," 19
and were signed by the agents of the said company without the authority or knowledge of the master of the said steamship. They further say that the said contract was between the New York and Porto Rico Steamship Company and the libelants, out of which no lien arises against said steamship on account of any breach thereof.

EIGHTH.—In the alternative, they allege that by the terms of the said bill of lading, the act of God and all accident, loss and damage whatsoever from machinery, boilers and steam navigation, or from perils of the seas and rivers, or from any neglect or default whatever of the pilot, master or mariners were excepted, and neither the ship nor the owners were to be liable for damage arising 20
from any of the said causes.

It was further provided therein that the ship owner was not to be liable for any damage to goods capable of being covered by insurance; and that in case any claim should arise against the steamship or owners for loss or damage accruing on the voyage, such claim was to be limited in amount to the value of the articles at the port of shipment, upon the date of shipment, and was to be preferred at the office of the agent of the steamship at the port of destination, within three days after delivery of the merchandise, in default whereof, it was agreed between the parties to the said bill of lading, that claims for loss or damage should be deemed waived, and the steamship and her owners discharged therefrom. Upon information and belief, they allege that said claim was not pre- 21
sented within three days, as prescribed by the said bill of lading; that the said goods were insured and that the loss has been paid under the policies on account of the damage complained of in the amended libel.

It was further provided in the said bill of lading that the steamship and her owners should not be liable for leakage, breakage, or any decay of goods, or damage to packages caused thereby.

NINTH.—Further answering, claimants allege that libelants filed a previous libel for damage to cargo on the same

22 voyage, to which the claimants appeared and gave security, and that said libel proceeded to a final decree in favor of the libelants. If the libelants suffered any damage by reason of the premises alleged in the amended libel in this suit, said damages were ascertained or were ascertainable at the time of filing previous libel, and then constituted a legal demand against said steamship that should have been included in the libel then filed.

The claimants deny the right of libelants to split up their causes of action for damages arising on the same voyage, and allege the facts above stated and the decree rendered under the libel previously filed as a defense and in bar of this suit.

23 Wherefore, claimants pray that the said libel may be dismissed as to the steamship *Centurion*, her tackle, apparel and furniture, with costs, or that this Honorable Court will make such other or different decree in the premises as justice may require.

CONVERS & KIRLIN,
Proctors for Claimants.

SOUTHERN DISTRICT OF NEW YORK, }
County of New York, } ss.:

J. PARKER KIRLIN, being duly sworn, says: That he is one of the proctors for the claimants herein, and that the
24 foregoing answer is true, according to his information and belief, derived from statements made to him by the master, officers and agents of said steamship.

J. PARKER KIRLIN.

Sworn to before me this }
6th day of July, 1894. }

FREDERICK GREEN,
[SEAL.] Notary Public,
New York County.

Interrogatories addressed to the Libelant, which it is required to answer in writing and under oath.

FIRST INTERROGATORY.—Is it not a fact that the cargo in question was imported upon the same voyage as the sugar involved in the previous libel filed against the steamship *Centurion*, under which you obtained a decree in this Court, which was filed in the Clerk's office on June 11, 1894?

SECOND INTERROGATORY.—Had the title to the sugar specified in the amended libel herein vested in your company at the time the previous libel was filed? If not, please state the date when the said title became vested.

THIRD INTERROGATORY.—Please state the date of the delivery of the sugar specified in the amended libel herein from the steamship to the refinery.

FOURTH INTERROGATORY.—Please state the date upon which a claim against the said steamship for the damages specified in the amended libel was preferred at the office of the agent of the steamship? Annex a copy of the claim as preferred to your answer to this interrogatory.

FIFTH INTERROGATORY.—Is it not a fact that the sugar specified in the amended libel herein was insured against loss or damage accruing on the voyage in question from Port Rico to New York? If so, please annex a copy of the policy to your answer to this interrogatory.

SIXTH INTERROGATORY.—Is it not a fact that you have received money from your insurance company or companies on account of the loss specified in the amended libel? If so, how much have you received on account of the said loss?

SEVENTH INTERROGATORY.—If, in answer to the last interrogatory, you state you have not received any money from your insurance companies on account of the loss

28 mentioned in the amended libel, please state whether or not you have made any claim upon your underwriters for the said loss; and, if so, how much you have claimed against them.

CONVERS & KIRLIN,
Proctors for Claimants.

(Endorsed)—United States District Court.—American Sugar Refining Co., Libelant, against The S. S. *Centurion*, &c., John Blumer & Co., Claimants.—Copy. —Answer to Libel and Interrogatories.—Convers & Kirlin, Proctors for Claimants, 5 Beekman St., New York, N. Y.—Filed July 17, 1894.

29

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

AMERICAN SUGAR REFINING COMPANY AND JOHN B. GOSSLER

AGAINST

The Steamship "CENTURION," her tackle, &c.

30

ANSWER OF THE LIBELANTS, THE AMERICAN SUGAR REFINING COMPANY AND JOHN B. GOSSLER, TO THE PETITION OF JOHN BLUMER & CO.

The libelants, reserving to themselves all right to object to the jurisdiction of the Court in this proceeding, answer the petition as follows:

I.—The libelants admit the allegations of the first and second paragraphs.

II.—The libelants are strangers to the matters alleged in 31
the third paragraph of the petition, and leave the petitioners to proof thereof.

MACFARLAND & PARKIN,
Proctors for Libelants.

Southern District of New York, ss.:

WILLIAM PARKIN, being duly sworn, says: That he is one of the proctors for the libelants; that the foregoing answer is true, according to his information and belief, derived from interviews with the libelants. He further says that the reason this answer is not verified by the libelants is that the American Sugar Refining Company is a foreign corporation, and the libelant Gossler is a non-
resident. 32

WILLIAM PARKIN.

Sworn to before me this 5th day of July, 1894.

JAMES F. HURON,
[SEAL.] Notary Public,
Westchester Co.
Cert. filed in N. Y. Co.

(Endorsed)—U. S. District Court.—American Sugar Refining Company & ano., Libelants, *vs.* The S. S. *Centurion*.—Answer.—MacFarland & Parkin, Proctors for Libelants, 22 William St., New York City.—Filed Sept. 24, 1894.

Office Supreme Court, U. S.
FILED.
JUL 6 1894
JAMES H. McKENNEY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 8, Original.

EX PARTE: IN THE MATTER OF THE NEW YORK & PORTO RICO STEAMSHIP COMPANY, PETITIONER.

Exhibit to Petition for Writ of Prohibition.

United States of America, *Southern District of New York*, } ss:

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 16th day of April, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and eighteenth.

Seal District Court of the United States, Southern District of N. Y.

SAML H. LYMAN, *Clerk.*

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel of The American Sugar Refining Company, a corporation organized under the laws of the State of New Jersey, and John B. Gossler, doing business under the firm name of Gossler & Co., against The British Steamer "Centurion," her tackle, apparel, and furniture, and all persons intervening for their interest therein in a cause of contract, civil and maritime, alleges as follows:

First. In the month of January, 1893, the steamer "Centurion" sailed on a voyage from New York to various ports in Porto Rico and thence to New York. During said voyage the firm of Fritz Lund & Co. shipped on board of her in good order and condition

676 hogsheads of sugar, of which 160 hogsheads were shipped at Ponce, 40 hogsheads at Humacao, 250 hogsheads at Arroyo, and 226 hogsheads at Guayanilla. During the same voyage the firm of Schulze & Company shipped on board said vessel in good order and condition 710 hogsheads, of which 47 hogsheads were shipped at Humacao, 227 hogsheads at Mayaguez, and 110 hogsheads at San Juan. The said sugar was to be carried and transported to New York and delivered to order or assigns in like good order for the freight agreed upon, the said shippers receiving therefor from the master or agent of the said vessel bills of lading, wherein and whereby it was agreed that the said steamer should carry and transport the said sugar and deliver the same to the consignees or their order on payment of the freight agreed.

Second. Thereafter the said shippers endorsed said bills of lading in blank and, for value received, delivered them to the said Gossler & Company, who thereupon became entitled to the delivery of all of the sugar so shipped. Thereafter the American Sugar Refining Company agreed to purchase so much of said sugar as should be delivered from said steamer, and thereupon the bills of lading were transferred and delivered to it.

Third. The libelants allege on information and belief that a part of said sugar was placed on board said steamer in the lower hold, and above said sugar, between decks, was stowed a number of hogsheads of molasses, and, with said cargo on board, said steamer sailed from Porto Rico for the port of New York, where she arrived on or about the 26th day of February, 1893; but notwithstanding the libelants have been at all times and now are ready to receive said sugar in good order and on so receiving the same to pay the freight thereon, yet the said master has not yet delivered the whole thereof to the libelants in good order, but, owing to the careless, negligent, and improper manner in which said cargo was stowed and the want of proper care on the part of the master, his officers and crew, or of the agent of said vessel and the persons employed by him, a large portion of said cargo was lost and other portions greatly damaged.

The libelants allege upon information and belief that before the cargo was put on board said steamer her hold and bilges were not properly cleaned and prepared for the carriage of said cargo, and that her hatches between the molasses and sugar were not properly closed. During the voyage the officers and crew neglected to properly operate the pumps, and, a number of hogsheads of molasses having been broken and others having been shifted, either through stress of weather or improper stowage, their contents ran down into the lower hold upon the sugar, partly through the hatches and partly through the scuppers; that by reason of such defective condition of the hatches, pumps, bilges, sluiceways, decks, scuppers, and other equipment and appurtenances and the failure and neglect of the officers and crew or those in charge of her to properly pump the vessel, the molasses and drainage from the sugar collected in the lower hold, washing out part of the sugar from the

hogsheads and damaging the remainder, to the libelants' damage fifteen hundred dollars.

Fourth. That the said steamer is now or is shortly expected to be within the southern district of New York and within the jurisdiction of this court, as the libelants are informed and believe.

Fifth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libelants pray that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, may issue against the said steamer, her tackle, apparel, and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid with costs, and that the said steamer may be condemned and sold to pay the same, and that the libelants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

MacFARLAND & PARKIN,
Proctors for Libelants.

SOUTHERN DISTRICT OF NEW YORK, *ss.:*

William Parkin, being duly sworn, says that he is one of the proctors for the libelants herein; that the libelant The American Sugar Refining Company is a foreign corporation, organized under the laws of the State of New Jersey; that the libelants Gossler is a non-resident of the State of New York; that the matters set forth in the foregoing libel are derived from documents and papers in deponent's possession and from information furnished deponent by the libelants; that he has read the foregoing libel, and the matters therein stated are to the best of the knowledge, information, and belief of this deponent.

WM. PARKIN.

Sworn to before me this 21 day of July, 1893.

JOHN McCLURE,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) Libel. Filed July 22, 1893.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the 3d day of October, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Addison Brown, district judge.

STEAMSHIP CENTURION, HER ENGINES, &c.,
etc.
AM. SUGAR REFINING Co. *et al.*, Libts.

And now John Blumer & Co., owners of the S. S. Centurion, intervening for the interest of themselves, as owners of said steamship,

in the said steamship, appears before the honorable court and makes claim to the said steamship, issuing of process being waived; and the said John Blumer & Co. aver that they were in possession of the said steamship at the time of the attachment thereof, and that the persons above named are true and *bona fide* owners of the said steamship, and that no other person is the owner thereof. Wherefore they pray to defend accordingly.

JOHN BLUMER & CO.,
By J. P. KIRLIN.

CONVERS & KIRLIN,
Proctors for Claimant.

CITY & COUNTY OF NEW YORK, *ss.*:

J. P. Kirlin, being duly sworn, says that he resides in the city of New York and is one of the proctors for the above-named John Blumer & Co., owners of the steamship Centurion, and that the said owners reside at Sunderland, England, and that deponent is duly authorized to put in this claim on behalf of the said owners, and that the said claim is true, according to his information and belief derived from statements made to him by agents of the claimants.

J. P. KIRLIN.

Sworn to before me this 3rd day of October, 1893.

GEO. A. BAKER,
[SEAL.] *Notary Public, N. Y. Co.*

(Endorsed:) Claim. Filed 4th day of Oct., 1893.

United States District Court, Southern District of New York.

AMERICAN SUGAR REFINING CO. and JOHN B. GOSSLER
against
THE STEAMSHIP CENTURION, HER TACKLE, ETC.

To the Honorable Addison Brown, district judge:

The petition of John Blumer & Co., owners of the steamship Centurion, respectfully show unto the court as follows:

First. On or about the 21st day of July, 1893, a libel was filed against the steamship Centurion by the American Sugar Refining Company and John B. Gossler to recover the sum of $1,500 for damages claimed to have been caused to a consignment consisting of 1,386 hogsheads of sugar, the property of said libelants, on a voyage from ports in Porto Rico to New York. The allegations of fault contained in said libel are as follows:

"The libelants allege on information and belief that a part of said sugar was placed on board said steamer in the lower hold, and above said sugar, between decks, was stowed a number of hogsheads of molasses, and with said cargo on board said steamer sailed from Porto Rico for the port of New York, where she arrived on or about the 26th day of February, 1893; but notwithstanding the libelants

have been at all times and now are ready to receive said sugar in good order and on so receiving the same to pay the freight thereon, yet the said master has not delivered the whole thereof to the libellants in good order, but owing to the careless, negligent, and improper manner in which said cargo was stowed and the want of proper care on the part of the master, his officers and crew, or of the agent of said vessel and the persons employed by him, a large portion of said cargo was lost and other portions greatly damaged.

The libelants allege upon information and belief that before the cargo was put on board said steamer her hold and bilges were not properly cleaned and prepared for the carriage of said cargo, and that her hatches between the molasses and sugar were not properly closed. During the voyage the officers and crew neglected to properly operate the pumps, and a number of hogsheads of molasses having been broken and others having been shifted, either through stress of weather or improper stowage, their contents ran down into the lower hold upon the sugar, partly through the hatches and partly through the scuppers; that by reason of such defective condition of the hatches, pumps, bilges, sluiceways, decks, scuppers, and other equipment and appurtenances and the failure and neglect of the officers and crew of those in charge of her to properly pump the vessel, the molasses and drainage from the sugar collected in the lower hold, washing out part of the sugar from the hogsheads and damaging the remainder, to the libellants' damage fifteen hundred dollars."

Second. The vessel being within the jurisdiction, service of process was waived and your petitioners, John Blumer & Co., appeared and filed a claim to said steamship and a stipulation for value in the sum of $1,500.

Third. The Centurion at all the times mentioned in the said libel of the American Sugar Refining Company and John B. Gossler was under a time charter to the New York and Porto Rico Steamship Company, a domestic corporation, by a charter of demise, which provided, amongst other things, that all cargoes should be loaded and stowed by the said charterers, and all work and labor in and about the loading, stowage, and discharging thereof was performed and paid for by the charterers and their servants, the master and officers of said steamship under the charter-party having no duties to perform in connection with the loading, stowage, and discharge of the cargo, their functions being limited exclusively to the navigation of the vessel. The cargo in question was loaded by the agents and servants of the said charterers, the New York and Porto Rico Steamship Company, in Porto Rico, under the supervision of their purser and supercargo, who accompanied the vessel, and if there was any negligence in and about the loading, stowage, or care of the said cargo, as alleged in the said libel (which is expressly denied), such improper stowage, negligence, and want of care was on the part of the said servants of the time charterers and not on the part of the master, officers, and crew of said steamship.

Fourth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore your petitioners pray that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the New York and Porto Rico Steamship Company, citing it to appear and answer this petition and the libel aforesaid, and that this honorable court will be pleased to pronounce against the said New York and Porto Rico Steamship Company, instead of against the petitioners, in case the allegations of the said libel be proved and sustained; and the petitioners pray for such other and further relief as they may be entitled to receive, with costs.

CONVERS & KIRLIN,
Proctors for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, *ss*:

J. Parker Kirlin, being duly sworn, says that he is one of the proctors for the petitioners; that the foregoing petition is true according to his information and belief, derived from statements made by the officers of the steamship Centurion. He further says that the reason why this petition is not verified by the petitioners is that they are absent from the United States.

J. P. KIRLIN.

Sworn to before me this 28 day of February, 1894.

CHARLES A. BRODEK,
[SEAL.] *Notary Public, New York County.*

(Endorsed:) Petition bringing in N. Y. & Porto Rico Steamship Company. Filed Feb'y 28th, 1894. Let process issue as prayed. A. Brown.

[SEAL.] SOUTHERN DISTRICT OF NEW YORK, *ss*:

The President of the United States of America to the marshal of the southern district of New York, Greeting:

Whereas a libel hath been filed in the district court of the United States for the southern district of New York on the 22d day of July, in the year of our Lord one thousand eight hundred and ninety-three, by American Sugar Refining Company *et al.*, libelants, against the steamer Centurion, her engines, &c., in a certain cause, civil and maritime, for damages to cargo therein alleged to have been sustained by the libelants, amounting to $1,500; and

Whereas a petition hath been filed on the 28th day of February, 1894, by John Blumer *et al.*, claimants of the above-named steamer, praying that the New York and Porto Rico Steamship Company be made a party respondent, and that a citation be issued against said respondent, citing it to appear and answer the libel and petition aforesaid; and

Whereas an order has been duly entered this day directing that said citation issue:

Now, therefore, we do hereby empower and strictly charge and command you, the said marshal, that you cite and admonish the said respondent, if it shall be found in your district, that it be and appear before the said district court on the 6th day of March, 1894, at the United States court-rooms, in the U. S. court and post-office building, in the city of New York, then and there to answer the said libel and petition and to make its allegations; and you have then and there this writ, with your return thereon.

Witness the Hon. Addison Brown, judge of said court, this 1st day of March, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the one hundred and eighteenth.

SAM'L H. LYMAN, *Clerk.*

CONVERS & KIRLIN,
Proctors for Petitioners.

(Endorsed:) Citation. Filed March 6, 1894.

(Attached to the above:)

I hereby certify that on the 2 day of March, 1894, at the city of New York, in my district, I personally served the within citation upon the within-named New York and Porto Rico Steamship Company by exhibiting to Henry T. Knowlton, treasurer of said company, the within original, and at the same time leaving with him a copy thereof.

JOHN W. JACOBUS,
United States Marshal, Southern District of New York.

Dated Mar. 6, 1894.
C. H. J.

U. S. District Court, Southern District of New York.

AMERICAN SUGAR REFINING CO. and JOHN B. GOSSLER
vs.
THE STEAMSHIP CENTURION.

In the matter of the petition — John Blumer & Company, owners of the steamship Centurion.

The New York and Porto Rico Steamship Company, appearing especially for the purpose of objecting to the jurisdiction of this court by Geo. A. Black, their proctor, come now and move this court to set aside the process issued herein upon the petition of John Blumer & Company for the reasons—

I. That this court has no jurisdiction in admiralty to entertain such petition.

II. That upon the face of said petition it does not set forth any

case wherein process ought of right to issue against the said New York and Porto Rico Steamship Company.

GEO. A. BLACK,
Proctor for the New York and Porto Rico Steamship Co. for the Purposes of said Motion Only,
44 Pine Street, New York City.

(Endorsed:) Motion to set aside process. Filed M'ch 6, 1894.

I cannot sustain either of the within objections, and no such inconveniences are made probable as should lead to the disallowance in this instance as a matter of discretion.

March 16, '94.

A. B.

At a special term of the district court of the United States for the southern district of New York, held at the post-office building, in the city of New York, on the 22nd day of March, 1894.

Present: Honorable Addison Brown, district judge.

AMERICAN SUGAR REFINING CO. and JOHN B. GOSSLER
vs.
THE STEAMSHIP CENTURION.

In the matter of the petition of John Blumer & Company, owners of the steamship Centurion.

On reading the petition of John Blumer and Company, verified February 28, 1894, and the notice of motion to set aside the process issued herein pursuant to the prayer of the said petition, now, after hearing George A. Black, proctor for the New York and Porto Rico Steamship Company for the purpose of said motion only, in support thereof, and J. P. Kirlin, in opposition thereto, and on motion of Convers & Kirlin, proctors for the petitioners, it is—

Ordered that the said motion to set aside, on the grounds stated in the moving papers, the process issued herein pursuant to the prayer of the petition (which said motion was filed March 6, 1894) be, and the same hereby is, denied.

ADDISON BROWN.

(Endorsed:) District court of the United States for the southern district of New York. American Sugar Refining Co. *et al. vs.* The Steamship "Centurion," &c., *et al.* Certified copy record.

(Endorsed:) Supreme Court U. S., October term, 1894. Term No., 8, original. *Ex parte:* In the matter of The New York & Porto Rico Steamship Company, petitioner. Exhibit to petition for writ of prohibition. Filed July 6, 1894.

Office Supreme Court U. S.
FILED.
DEC 14 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court

Of the United States.

In the Matter

of

The Petition of the New York & Porto Rico S. S. Company for a Writ of Prohibition.

Brief for Petitioner.

GEORGE A. BLACK,
Of Counsel.

Supreme Court of the United States.

In the Matter

of

The Petition of the NEW YORK & PORTO RICO S. S. COMPANY for a Writ of Prohibition.

BRIEF FOR PETITIONER.

This Court has granted an order to show cause *why its writ of prohibition should not go to the District Court* of the United States for the Southern District of New York and the Judge thereof. This order was served on Judge Addison Brown and on the Clerk of the said Court on July 10, 1894, and Judge Brown has filed his "*return*."

In this paper six reasons are assigned by the learned Judge in justification.

(1) Because the libellant alleged damages to his cargo by *different acts* of negligence, for some of which, as alleged in the owner's petition, the charterers "would be primarily liable and **bound to indemnify**" the ship-owner (fol. 3 of return).

(2) That the presence of the charterer was necessary:

(*a*) To avoid a multiplicity of suits.

"The Judge uses the words "bound to indemnify" in a colloquial, rather than a strict legal sense—*liability to answer over for damages*, is different from the obligation to indemnity, arising from the contract of suretyship, and different results (lost sight of by the learned Judge) flow from this difference" (see Post pp. 20, 23).

(*b*) To secure a *complete* hearing of the subject matter through the presence of all the parties.

(*c*) To obtain an adjudication which should do **justice** to each and be binding on all.

(*d*) To avoid conflicting decisions to which separate suits would be liable, through the **different evidence** likely to be produced in them when the parties were different, and thus to avoid any possible failure of justice through such causes, and any discredit to the administration thereof (fol. 4 of return).

(3) That the process issued against the charterer was "deemed "to be *within the spirit*," though not within the letter "of "the 59th Admiralty Rule" (fol. 4 of return).

(4) That the District Court had **authority** to issue the process:

(*a*) Because no *express* rule of the Supreme Court forbade it.

(*b*) Because by § 918 of the R. S., the District Court is authorized "to regulate its own *practice*."

(*c*) Because Admiralty Rule 46 authorizes the D. C. "in cases not provided for by previous rules to "regulate its *practice*" (fol. 5 of return).

(5) That since the 59th Ad. Rule, the resort to it has been most useful in cases of torts and conducive (in that class of cases) "to the *satisfactory* **distribution** of justice" (fol. 6 of return).

(6.) Because no "*inconvenience*" to the charterer was shown or even averred (fol. 7 of Return).

When a logical mind deals with a given proposition it is apt to become impatient when an irrelevant reply is made to a direct question.

The direct question addressed to the District Court by this Court is:

"Where is your legal authority, as a Court of Admiralty, for "issuing the process you have issued?"

When that Court answers: "I **ought** to have the authority "*because* and *because*," etc., it has progressed very little way towards showing that it has got it.

Such reasons might have weight with a committee of Congress which was investigating the advisability of a change in the law, but so long as Congress has the legislative functions exclusively entrusted to it, it is singularly *impertinent* (in its etymological sense) for courts to undertake to do its work.

A mere inspection of the six reasons assigned by the District Judge in this "Return," show that only one, the 4th, is *relevant*, and as to this, *in addition to what I have said in my brief on motion for leave to file petition* (**hereto annexed**), I say as follows:

Judge Brown refers to §918 of the R. S., whereby (*as he says*): "This Court is authorized to regulate its own practice as may "be necessary or convenient for the advancement of justice and "the prevention of delays in proceedings."

Why, oh, why, didn't he read §917, where power is given to the **Supreme Court** "*generally* to regulate the *whole* prac- "tice to be used in **equity**, or **admiralty** by the Circuit and "District Court;" and in which "*discovery*" and "*decrees*" are mentioned, while §918 obviously and by reference to "*judgments*" refers especially to **common-law** practice, *which is not mentioned in §917* and for the plain reason that in all the Courts of the United States "*equity and admiralty*" were to be uniform, while common-law practice varied as the laws of the different States varied (see §§ 914, 915 and 933).

The canon of construction, "*ejusdem generis*," must be applied (see per Lord Herschell; Thames and M. Ins. Co. *vs.* Hamilton, 12 Ap. C., 494; Queen *vs.* Silvester, 33 L. J. M. C., 79; 9 L. T. N. S., 682, 4 B. & S., 927).

Gunnestad vs. Price, L. R., 10 Ex. 69 Cleasby, B. "The maxim that general words are limited in their application "is constantly acted upon. The maxim itself is that expressed "by Bacon (Max. Reg. 10): 'For all words, whether they be in "'deeds **or statutes**, or otherwise, if they be general, and "'not express and precise, shall be restrained unto the fitness "'of the matter or person.'

"Where they follow an enumeration of particular things, "they do not introduce things of a *higher* and different charac-

" ter. See Archbishop of Canterbury's Case, 2 Co. Rep., 46 a; " Casher *vs.* Holmes, 2 B. & Ad., 592.

" In the judgment in Reg. *vs.* Edmundson, 2 E. & E., at p. 83, " Lord Campbell lays down the rule thus. " The general prin- " ciple laid down in all the cases which have been cited is, that " where particular words are followed by general words, the " latter must be construed as *ejusdem generis* with the former. " And in the judgment in Reg. *vs.* Cleworth, 4 B. & S., at p. " 932 the present Lord Chief Justice used the following language: " ' Then there is a general expression "other person whatsoever" " ' but according to a well established rule in the construction " ' of statutes, general terms following particular ones apply " ' only to such persons or things as are *ejusdem generis*.' "

Sun Fire Office vs. Hart (1889), 14 Ap. C., 103—Lord Watson: " It is a well known canon of construction that where " a particular enumeration is followed by such words as 'or " other,' the latter expression ought, if not enlarged by the " context, to be limited to matters *ejusdem generis* with those " specially enumerated."

See for other cases **Endlich on Interpretation of Statutes**, §§ 405 to 411.

So applied, when § 918 gives the Circuit and District Courts power to make rules "directing the *returns* of writs, the *filing* " of pleadings, the *taking* of rules, the *vacation* and *noting* " *up* of judgments *by default* and **other** matters in vacation, " and **otherwise** regulate their own practice:" the "other- wise," must be of the *like kind* of rules, and would give no power to create a new remedy.

THE FIVE IRRELEVANT REASONS.

I. The "indemnity" reason is based on a miscon- ception.

The original petition of the steamship owner, upon which (*and nothing else*) the District Court issued its process against the charterer, *alleged no contract of indemnity*. The charter was not annexed to it, and the allegations of the petition was that the "Centurion" was under a time charter which provided that " all cargoes should be loaded and stowed by said char-

"terers" * * "and paid for by the charterers and their "servants, the master, under the charter-party, having no "duties to perform in reference to the loading," &c.

If you substitute "stevedore" for charterer in the above, you would have a contract to do certain work (impliedly in a workman-like fashion), and for a breach, *damages* might be recovered, but no one would call it a contract of indemnity.

See **Speller vs. Nav. Co.** (1884), 13 Q. B. D., 96 (quoted from at p. 20 of this brief.)

But to avoid the possibility of the claim that I am making a technical objection which could be removed by an amendment, I annex to this brief a copy of the charter, as Judge Brown has annexed to his "Return" a copy of the Answer of the owner of the steamship to the libel, by which it appears that the 21st clause of the charter-party provided "that no claim was to be made against the owners for *loss* of cargo" (see fol. 16 of return), but the charter expressly provided that the vessel was to be tight, staunch and strong (fol 3), and by

Art. 1. The owner should maintain her in a thoroughly efficient state in hull, &c. (fol. 5), and by Art. **21** "That the charterers shall **not** be responsible for losses incurred by reason "of the default or negligence of the pilot, master or crew in the "navigation or **management** of the ship (fol.).

II.—"The presence of the charterer was necessary," says Judge Brown, and he has given four *reasons*.

Of course what is a "reason" in one case should be an equally good reason in *all like cases*, and there must be something amiss with the so called "reason" if it won't work so.

However desirable it is that the **law** should be kept in good repute, it should be remembered that its *ministers* are generally responsible for a contrary result, and that the attempt to *force* a result is always hazardous and generally unsuccessful.

As I pointed out in my brief (p. 6) the rules of **evidence** and **burden of proof** in the action of the cargo-owner against the ship, on the contract of carriage, differ from those applicable to a suit brought to establish the liability of the charterer to the ship-owner for *negligence*, and that in the former case (cargo-owner's suit) the contract for carriage and delivery in good order and damage being proved, the ship owner can escape liability *only* on proof of an *excepted peril*.

Trans. Co. vs. Downer, 11 Wall., 133, Field, J., "On the "trial the plaintiff made out a *prima facie* case by producing "the bill of lading showing the receipt of the coffee by the "company in New York and the contract for its transportation "to Chicago, and by proving the arrival of the coffee at the "latter place in the propeller 'Brooklyn' in a ruined condition, "and the consequent damages sustained."

Woodley *vs.* Mitchell, 11 Q. B. D., 51.
The Freedom, 2 Ad. & Ec., 346.

Again in the action of the cargo owner against the ship or her owner the **log of the ship** was not competent evidence **for** the ship-owner. *While in the suit of the ship-owner against the charterer the burden of proving negligence would lie upon the ship-owner, and* **his log would be almost conclusive** *against the ship-owner.*

3. Greenleaf's Evidence, § 428: "It was observed by "Lord Stowell that the evidence of the log-book is to be received "with jealousy, *where it makes for the parties*, as it may have "been manufactured for the purpose, **but it is evidence "of the MOST AUTHENTIC KIND against the "parties,** because they cannot be supposed to have given a "false representation with a view to prejudicing themselves."

For the above reason in **Schnieder vs. Batt** (1881), 8 Q. B. D., 701, the English Court of Appeals affirmed an order made by the Q. B. D. refusing to give directions under their third party procedure (see p. 15 of this brief) saying: "The defend-"ants had written a letter which would render the action unde-"fended against the plaintiff **but which would be no "evidence against the third party"** (p. 703).

The "*reasons*" assigned by Judge Brown sound well, but are specious.

If *one* trial is desirable when the *issue* is the same, without regard to the wishes of the plaintiff or the nature of the action or the rules of evidence or burden of proof, it must be desirable to extend it to *all* who are affected by that issue.

Take the celebrated instance of the action for nullity by the wife for the physical incapacity of her husband and the bastardy proceeding against the *same man* as the putative father, where, (as rumor goes), he was beaten in both actions to the great apparent but not real, scandal of justice.

Cases in which the effort has been made to adopt the co-respondent practice of the English divorce courts are rare, because our courts did not approve that practice.

See 2 Bishop Marriage and D., 4 ed., § 310.
Burke *vs.* Burke, 5 Misc. (N. Y.), 319.

The old "Voucher to Warranty" was confined to *real* actions. 2 Black. Com., 358.

Was abolished in England, by 3 and 4 Wm. IV., c. c. 27, 74.
And unknown in practice. Stephens' Pleadings, 85.
And never adopted in the U. S. 2 Burrill L. Dict., 614.

Nota Bene. The case of **Speller vs. Nav. Co.,** 13 Q. B. D., 96 (see p. 20 of this brief), closely resembles this case, but the English Court found no reason to think that the *issue* should be settled in a single action.

In England it required an Act of Parliament to do what the District Court has done in this case.

That act is as follows:

Chapter 66, 36-37 Victoria, 1873, commonly called the "**Judicature Act**" (L. R. 8 Statutes, p. 306), provides § **24** (p. 316), as follows:

"In every civil cause or matter commenced in the High Court "of Justice, law and equity shall be administered by the High "Court of Justice and the Court of Appeal according to the "rules following:

(3.) "The said Courts respectively, and every Judge "thereof, shall also have power to grant any defendant in "respect of an equitable estate or right, or other matter of "equity, and also in respect of any legal estate, right or "title claimed or asserted by him, all such relief against "any plaintiff or petitioner, as such defendant shall have "properly claimed by his pleading, and as the said Courts, "respectively, or any Judge thereof, might have granted "in any suit instituted for that purpose by the same de-"fendant against the same plaintiff or petitioner; and also "all such relief relating to or connected with the original "subject of the cause or matter, and in like manner claimed "*against any other person*, whether already a party to "the same cause or matter or not, who shall have been

"duly served with notice in writing of such claim, pursu-
"ant to any rule of Court or any order of the Court, *as*
"*might properly have been granted against such person*,
"if he had been made a defendant to a cause duly insti-
"tuted by the same defendant for the like purpose; and
"every person served with any such notice shall thenceforth
"be deemed a party to such cause or matter, with the same
"rights in respect of his defense against such claim, as if
"he had been duly sued in the ordinary way by such de-
"fendant."

The cases arising under this act as regulated by the rules of 1875, and also under the more *limited* rules of 1883, are (*as far as I have been able to find them*) as follows: And they show the reluctance of the English courts to extend the cases, and that experience soon showed the too broad scope of the act; for the rules of 1883 limited its application strictly to cases of "*indemnity*."

Thus Judge Pollock in **Pontifex vs. Foord** (1884) 12 Q. B. D., 152, pointed out (at p. 155) the difference between the old rule (1875) and the new (1883) and said: "the working of this (*i. e.* the old rule) "gave rise to great practical difficulties."

Treleven v. Bray (1875), 1 Ch. D., 176. Action for specific performance of an agreement to sell. Defendants applied under Order XVI r. 18 to serve the trustee of defendants who refused to concur in the conveyance as a third party. The defendant appealed from the refusal and the Court (James, *L. J.*, Mellish, *L. J.*, and Blackburn, *J.*) gave leave to serve the notice on proof being produced **that the plaintiffs concurred** in the application.

Benecke vs. Frost (1876), 1 Q. B. D., 419. Plaintiffs sued defendants for not accepting 183 chests of shellac, which were ordered of plaintiffs by defendants, and bought by them to fill the order, and the freight paid by them. The defendants set up that they were brokers, buying for principals, as the plaintiffs knew; that the principals were as to part Rea & Co., and as to the other Thew Bros. That the shellac was not according to quality, and that the defendants and their principals refused to accept the different parcels. Thew and Rea were served with third-party notices under Order XVI, Rule 18, and after they entered an appearance application was made under Rule 21 for directions by the plaintiffs, and Thew moved to set aside the notice and their appearance. In the course of the ar-

gument Judge Blackburn said : The object of the act was not only to " prevent the same question being litigated twice, but to " obviate the scandal which sometimes arose by the same ques- " tion being differently decided by different juries."

In the *per curiam* opinion, page 422, the Court directed that Thew Bros. might appear by counsel and defend the action so far as regards the quality of the shellac, and that they be bound by the finding of the jury on that question.

Swansea Shipping Co. vs. Duncan (1876), 1 Q. B. D., 644. Plaintiff, owner of ship Helen Burns, chartered to defendant, sued for 31 days' demurrage for delay in discharging at Leith.

Defendant, before the arrival of the ship, sold the cargo to the Br. Ag. Asso., which ordered the vessel to Leith and received the cargo.

" By the terms of the agreement of purchase, and according " to the custon of the trade the Association are bound to *in-* " *demnify* the defendants and repay them any sums due to " plaintiffs for the detention of the ship at her port of dis- " charge" (p. 645).

Defendant obtained an order at Chambers, under Order XVI., r. 17, 18, to serve notice on the Association, which moved to rescind the order. Cockburn, Quain and Pollock decided to rescind the order, as the case was not within Order XVI, as it did not appear that there was any question which was identical between the plaintiffs, defendants and the Association; the *contract* between the defendants and the Association being different from that under the charter-party between plaintiffs and defendant (p. 646). Defendants appealed, and Jessel, *M. R.*, Kelly, *C. B.*, Mellish, *L. J.*, and Denman, *J.*, all concurred in reinstating the order.

Jessel, *J.*, said, p. 648 : " As to the second point, it is said " that the *whole cause of action* between the plaintiff and de- " fendant, and the defendant and the third person *must be* " *identical ;* and on this objection the Court of Queen's Bench " seems to have decided against the order. I think the objec- " tion cannot be sustained. **If the plaintiff objects to " the third person being introduced,** the Court " would consider whether the plaintiff would be prejudiced in " any way or delayed in his action by such proceeding. But " here the plaintiff makes no such objection. The object of

"these enactments was to prevent the same question being "tried twice over where there is *any substantial question* "*common* as between the plaintiff and defendant in the action, "and as between the defendant and a third person, * * it "does appear to me that a material question is common both "between the plaintiffs and the defendants, and between the "defendants and the third persons as to whether the ship "was discharged as fast as the custom of the port of Leith "allowed."

Bower vs. Hartley (1876), 1 Q. B. D., 652. Plaintiff directed the defendant to insure certain cargo.

Defendant insured in an unauthorized manner (viz. F. P. A. *). Plaintiff sued defendant for the damage by reason of not being able to collect the insurance under the form taken by defendant. Defendant claimed that he had employed another broker, who had effected the insurance in an unauthorized manner, and defendants obtained a third party order under Order XVI r. 18, which was set aside, and on appeal to Q. B. the rescission was affirmed and defendant appealed.

James, *L. J.*, Mellish, *L. J.*, and Baggallay, *J. A.*, concurred in affirming the rescinding order **on the ground that the plaintiff would be prejudiced.** Note: There is no statement that plaintiff objected.

Fowler vs. Knoop (1877), 36 L. T., 219 (Ex. Div.). Plaintiff (shipowner) sued defendant (consignee of goods) for damages for delay in unloading. London Bkg. Asso. had bought the cargo afloat and K. served notice under Order XVI r. 18. The L. B. A. then took out a summons before Field, *J.*, at chambers, for leave to give notice **to the fourth party** to whom they had resold the cargo afloat, but he refused, and on appeal the Court (Clearsby and Field) granted the order, Field saying: "Had my attention been called to the last clause of sub-sec. 3, of sec. 24, I should not have refused the order."

Walker vs. Balfour (1877), 25 W. R., 511. Defendant having brought in McHenry by a **3d** party notice, McH. applied to bring in Lewis as a **4th** party, and got an order from a master to that effect. Cleasby, *B.*, set aside the Master's order and a motion was then made to rescind Cleasby's order, and it was denied, Denman, *J.*, saying (512): "Rule 17 does not

* Free of Particular Average.

"seem to apply at all. I do not read the rule as giving any "person brought in as a defendant *a right to bring in other "persons lolies quolies*: this would hinder the plaintiff in- "definitely."

Witham vs. Vane (1880), 28 W'kly R., 276. Similar application by 3d party to bring in an another, granted by Fry, *J.*, who referred to above case and the Judicature Act, 1873, § 24, Sub. 3, and said: "the attention of the Court does not seem to "have been called to this subsection."

Horwell vs. London Omnibus Co. (1877), 2 Ex. D., 365. In this case the plaintiff brough his action for personal injuries against the defendant. The defendant obtained an order under the Judicature Act of 1873 for service of a notice on the London Tramway Co., requiring it to appear if it wished to dispute liability. The London Tramway Co. did not appear, but applied to rescind the order, and it was rescinded by the Master, and on an appeal to Field, *J.*, the order of recision was confirmed, and on appeal to the Exchequer Division, the order was reinstated. The tramway company then appealed to the Court of Appeals, and the appeal was heard by the four judges, Brett, Bramwell, Kelly and Cockburn, and the three latter concurred in a reversal which dismissed the order permitting the tramway company to be notified.

Cockburn, *J.*, said (page 381): "But even if it could be held "that that part of the rule would enable a defendant to intro- "duce a third party as a defendant in the alternative, **it ap- "pears to me repugnant to every principle of "law and every notion of common sense, that "a man can be forced to be a plaintiff against "his will,** and be thus forced to sue another party whom he "does not desire to sue, and whom he has not made a defend- "ant, *by a proceeding had behind his back*, without his being "served with a proper notice upon a summons or rule. If it "were possible that a defendant could compel a plaintiff to "proceed against a second defendant, as well as against him- "self, at least it must be a preliminary condition that the "plaintiff should be heard to object to such a proceeding. It "may be said that there is no case against the third party: it "may be that to add him as a defendant will delay the plaint- "iff's case and put him to expense and inconvenience. Is it to "be said that he is not to be heard, and that the defendant can

" have it in his power to introduce a third party in the action " in despite of the plaintiff, who is the *dominus litis*, and has " the conduct and management of the case, and is entitled to " to conduct it in his own way and in the manner most consist- " ent with his own interests? * * * *I doubt very much* " *whether another defendant could be forced upon him, though* " *he was heard and had an opportunity of saying what he had* " *to say against the course of proceedings.* It is, at all events, " clear to my mind that to make him liable, by the mere action " of the defendant, to have another person introduced into the " action, *whom he did not want to have introduced there*, and " which might involve him in very serious inconvenience, and " possibly questions of costs, **is a thing perfectly out " of the question."**

Associated Home Co. vs. Whichcord (1877), 8 Ch. D., 457, plaintiff claimed from deft. £2,000, part of £14,000 purchase money paid for property of which the £2,000 was commission. Plaintiff claimed that the sale had been induced by promoters of the company, who had conspired to increase the purchase money, and who could not take any commission, and therefore the company was entitled to the £2,000. At the same time Hancock, Blaikie and Millar were suing Whichcord in the Exchequer Division to recover the same £2,000, as commission due to them, on the ground that they brought about the sale of the property, and they were to have, as commission, any excess over £12,000. Defendant applied to have notice served on Hancock, Blaikie and Millar under Order XVI, rule 17, of 1875, and Malins, V. C., denied the application, holding: " I do not " see why the plaintiffs here should be embarrassed with any " question between the defendant Whichcord and other persons. " *I think it is unreasonable* that they should be encumbered " with four defendants."

(3.) **Turner vs. Hednesford Gas Co.** (1878), L. R. 3, Exchequer 145. Plaintiff sued defendant for damages for preventing plaintiff from completing work under a contract with defendant. Defendant by counterclaim claimed £8,500, the sum they had been obliged to spend in completing the work, which was £256 in excess of what it would have cost them if plaintiff had fulfilled his agreement, and also set forth that one Round had bound himself by a bond to be answerable to defendants, to the extent of £200, for the execution of the con-

tract by plaintiff, and under the counterclaim sought to recover the £256 from the plaintiff and £200 from Round, whom they served with a defence and counterclaim under Order XXII, rule 6, on which Round, having appeared, moved to strike out the counterclaim, which was done by the Master, and his order being reversed by Pollock, B., at Chambers, Round appealed. Clearsby, B., Hawkins, concurring, reversed Pollock and struck out the counterclaim, saying:

> "The ground on which we act is that a counterclaim "must ask relief against the plaintiff, either separately or "jointly with some other person. * * * * What is the "counterclaim here? * * * Does it seek relief against "Round in respect of the same matter as against the plaint-"iff? We think not. * * * The two counterclaims are "quite separate and distinct."

The defendant then appealed to the Court of Appeals, which, Bramwell, Brett and Cotton, concurring, reversed the Exchequer Division.

> Bramwell, *L.*, said: "Could the defendants have brought "an action against Round and the plaintiff? I am of opin-"ion they could. The relief that the defendants claim "against Round is indemnity for the breach by the plaint-"iff of his contract, to the extent of £200, but the relief "that is sought is on a contract between the defendants "and Round; it is not a joint, but a several liability. If "the obligation, however, had been created between the "parties in one instrument, limiting Round's liability to "£200, in that case it would have been a joint contract, "and I think that the substance of the actual contract be-"tween the parties is the same."

Note the account.

For	Against
1. The Master.	1. Pollock,
2. Clearsby,	2. Bramwell,
3. Hawkins,	3. Brett,
	4. Cotton.

Wye Valley Railway Company v. Hawes (1879), 16 Ch. D., 489. An action was brought against five directors of

the plaintiff, and the contractor and financial agents, seeking to recover back money of the plaintiff, which it was claimed had been improperly paid by the directors to shareholders by way of dividend *out of capital*, under an arrangement between directors and the contractors. There were 450 shareholders, and the defendants claimed that the shareholders had notice of the circumstances and were advised that defendants (directors) had a right to be indemnified by the shareholders, and they took out a summons under Order XVI., rule 18, to serve on the shareholders to whom any part of the money had been paid, claiming to be indemnified. Hall, Vice-Chancellor, refused to make the order until notice had been given to the plaintiffs. Plaintiff was represented in Court, but was not heard, and Hall, V. C., denied the application on the ground that it would be *inconvenient* to sanction a proceeding which would have the effect of embarrassing the plaintiffs in proceeding with their action, and that the whole thing would be highly inconvenient; and left the defendants to take the ordinary course of bringing independent actions. Defendants appealed to the Court of Appeals, and Jessel, *M. R.*, stated (page 493):

> "All these rules in favor of a defendant are subject to "this observation, that *they are not intended to embarrass "the plaintiff* in his action."

And he went into a mathematical computation showing that:

> "If that were carried to its full extent, which, I agree, is "not probable, and I might say not possible, *you would "have 450 defendants with 450 counsel, or it might be 900 "counsel, entitled to appear at the trial with a tribe of "witnesses brought by each one.* Of course, I know this is "putting the thing in a very absurd light;"

and he came to the conclusion that the order of the Court below should be sustained. Cotton, *L. J.*, concurred, holding that, *although the case was within the rule*, that the application ought not be allowed where it would hinder the plaintiff.

> Lush, *J.*, also concurred, saying that "If these persons "are brought in, it is impossible to deny them the right, if "they please, to be represented at the trial and to call "their own witnesses. How can this be done without

"putting the plaintiff to an enormous inconvenience and "embarrassment, and virtually rendering all the trial "abortive?"

Butler v. Butler (1880), 14 Ch. D., 329. The plaintiffs, beneficially entitled under a will, claimed that certain investments of trust property were improper and breaches of trust on the part of the defendants (trustees under the will), and claiming to have the money made good for the benefit of the plaintiffs. One of the defendant trustees claimed that the other defendant was primarily liable to make good the same sums and claimed to be indemnified by him. The case was tried, and it was held that the investments were improper, and were breaches of trust, and that the defendants were jointly and severally liable. On an application for further consideration, the defendant, John Butler, asked for an inquiry as to how and in what proportion, as between the defendants, the sums to be paid to plaintiff were to be borne. Bacon, *V. C.*, said:

"*This is a totally new practice, and we must be cau-*
"*tious in what we do.*" And ended by saying: "I must "take care not to have the decree, as far as the plaintiff is "concerned, incumbered by it."

Schneider v. Batt (1881), 8 Q. B. D., 701. Plaintiff sued on a written agreement with the defendant to sell to the plaintiff and that the plaintiff should buy 75 tons Belgian nail rods, to be delivered f. o. b. at Antwerp, and alleged that the defendant shipped and offered to deliver nail rods which were not of the quality agreed on, and were wholly different in kind and description and were unmerchantable, whereby the plaintiff lost the price which he had paid and the profits, and incurred expenses. He sued in the alternative for a breach of warranty or for the recovery of the price as money received to his use. The defendants alleged that they delivered the agreed quality and description, and denied the warranty. The defendants then by a notice issued under Order XVI, Rule 18, brought in one Panwells, a third part, and applied for directions under Order XVI, Rule 21. The Court directed pleadings to be delivered between the defendant and the third party, and accordingly the defendants alleged that they agreed to buy and accept of the third party 500 tons of Belgian nails of the same

kind, quality and description as those to be sold to the plaintiff, to be delivered f. o. b. at Antwerp, and set forth that the defendant delivered nail rods of a different and inferior quality and description, and that the third party knew that the defendants bought the nail rods to sell again, and that the defendants sold and delivered to the plaintiff 75 tons of these nail rods, which the plaintiff repudiated; and **defendant claimed damages, and to be indemnified by the third party.** The third party denied the breach of the agreement and that he had notice of what defendants intended to do with nail rods. The Queen's Bench Division refused to give directions, on the ground *that plaintiff might be embarrassed* and delayed in the prosecution of the action and **also on the ground that the defendants had written a letter which would render the action undefended against the plaintiff, but which would be no EVIDENCE against the third party** (763). The Court of Appeals affirmed. The action between plaintiff and defendant having been tried, the third party took out a summons to set aside the defendants' reply and notice of trial, and his motion was granted, and defendant appealed. The opinion was by Lord Bramwell. The Court consisted of Bramwell, Cotton and Brett. He said of Order XVI, Rule 18;

> "*It has been argued that the rules of Court cannot "limit the operation of the Supreme Court of Judicature "Act*, 1873, § 24, Sub § 3, but the rules have received a "parliamentary sanction."

And says that the section was to be construed as permissive and not obligatory, and thereupon dismissed the appeal.

The Bianca, 1883, 8 P. D., 91. A ship in tow was sued by the owner of a vessel at anchor for a collision. The owner of the ship in tow under Order, XVI, rule 18, got an order at Chambers from Sir. R. J. Phillimore to serve a notice on the owners of the tug, claiming that they should indemnify the ship in tow, on the ground that the improper navigation, if any, was that of the tug.

An application was made to Butt, *J.*, to give directions under Order XVI, R. 21.

Butt, *J.*, p. 93. "*I see no sufficient reasons*, in face of the "plaintiff's opposition, *why I should embarrass the issue between*

"*them and the defendants with any further questions as to the* "*rights and liabilities of the defendants and third parties* "*inter se*. It is obvious from the pleadings that it is extremely "probable that questions will arise between the defendants and "the third parties totally different and distinct from those which "are necessary for the decision of the action as between the "plaintiffs and the defendants."

Order set aside.

The New Rules.

In 1883 a new set of rules was prepared for the English Courts under the authority of § 19 of the Judicature Act of 1881, and the rules of 1875 repealed. See **"Emden's Practice, Statutes, Orders and Rules,"** page 496; Schedule O, page 919, for rules repealed, referred to in introduction to rules, at page 503. This schedule shows that Rule 18 (of 1875) of Order XVI., is now Rule 48 of Order XVI., and that Rule 21 of 1875 is now Rule 53; and see page 550 of Emden for Order XVI., Rules 48 and 54, respecting the third party practice in England, and see the Act of 1873, § 24, Subd. 3, at page 442 of Emden.

Catton vs. Bennett (1884), 26 Ch. D., 161. Plff. (vendor) sued Bennett (vendee) and Smith (auctioneer to whom vendee had paid deposit of £500) for specific performance of contract for purchase of a house—or for damages. B. defended on the ground that auctioneer had announced at sale that only part cash was required and that balance of purchase-money could remain on Mortgage, which plaintiff alleged was unauthorized. B. took out a summons against the auctioneer, his co-deft. under Order XVI., rule 55.

Kay, *J.*, construed the old Order XVI., r. 17, and new Order XVI., r. 55 and pointed out the omission in the new rule of the words "or other remedy or relief over," and said: "The omis- "sion indicates very clearly *an intention on the part of the* "*framers of the new rule to confine the third-party procedure* "**to cases of contribution or indemnity**—and the "question here is whether this is a case for either as distin- "guished from 'any other remedy or relief'—words which are "not in the new rule 55, under which this application is made."

The Court then states the language of rule 55 and discusses

the nature of the claim made that the auctioneer's advertisement was without authority of the plaintiff, and says, stating the proposition advanced: "'It seems that you had no authority, and "'by reason of such act of yours I have suffered **damage** to "'the extent of £500, and I now ask, as against you, that you "'repay to me that *damage* and the costs in the action, which I "'have been ordered to pay to the plaintiff.' *Is that indemnity "or not? It is clearly not indemnity under any contract.*"

The Court then cited Pontifex *vs.* Foord, 12 Q. B., 152, and said (p. 168): "I think the case cited must govern my decision "in this case, and not seeing my way to differ from it, I hold "that this is not a case for *indemnity* within the rule."

Carshore vs. N. E. R'way. Co. (1885), 29 Ch. D., 344. Plff. owned stock of deft. Co., which was transferred by her agent, by forging (as alleged) her name, to one Farlow, and she sued the company to have her stock restored to her name.

Deft. got leave to serve a third-party notice on Farlow.

Plff. appealed.

Cotton, *L. J.*, construed Order XVI., R. 48, and held that deft.'s claim against Farlow was for *indemnity*, within the rule, and that the question of forgery arose as well between the plaintiff and defendant as between defendant and the third party, and that under rule 52, the Court could protect plaintiff against being embarrassed or put to additional expense.

Fry, *L. J.*, concurred, stating that the object of the rule "was "to enable the Court to try once for all an issue of fact in which "all parties are alike interested. Here all are interested in the "question whether the transfer was a forgery."

Appeal dismissed.

Hutchinson vs. Colorado United In. Co., Week. N., 1884, p. 40. Plaintiff sued to compel defendant to register plaintiff as owner of certain shares. Defendant applied on notice to plaintiff to serve 3d-party notice out of the jurisdiction on person who gave notice to defendant that he would hold them liable if they complied with plaintiff's claim. Matthew, *J.*, denied the motion saying: "I cannot make the order in this case *against the wish of the plaintiff*, as it would be tying up his action for three months.

Eden vs. Weardale I. and C. Co. (1884), 34 Ch. D., 223. Plaintiffs sued for a specific performance of an agreement

with the defendants for a lease to them of coal and fire clay. The Ecclesiastical Commissioners gave notice to *defendant* that the coal and fire clay belonged to them as Lords of the Manor, and the defendant refused to accept the lease, and applied, when sued, to have the Ecclesiastical Commissioners served with notice under order XVI., rule 48. *The Ecclesiastical Commissioners appeared and put in a counterclaim, which the Court held they had no power to do, and it was struck out*, and they thereupon obtained leave to appear on the trial, and put in evidence and cross-examine the plaintiffs' witnesses. The plaintiff then obtained leave to deliver interrogatories to the Commissioners, and from this order the Commissioners appealed. The Court held that *the Commissioners had put themselves* in the same position as if they had been original defendants, and that the order for interrogatories was right.

Pontifex v. Foord (1884), 12 Q. B. D., 152. Plaintiffs sued defendant for breach of a covenant to repair, contained in a lease running for 21 years from 1861. Defendant served a third party notice, claiming contribution from a sub-lessee to whom he had let the premises from 1869 for the remainder of the original term, less ten days. The under lease contained a covenant to repair which was in terms precisely similar to those of the covenant in the original lease, and for breach of which the defendant claimed relief against the sub-lessee. The third party having appeared an application was made for directions under Order XVI, rule 52, and the judge at Chambers refused to make any order, on the ground that the case was *not one of a claim for contribution or indemnity* and was not within the rules as to third party procedure. The defendant appealed. Judge Pollock (155) points out the difference between the new and the old rules, and said :

> "**The working of this rule**" (the old rule) "**gave rise to great practical difficulties.**"

He points out that the leases were for *different terms*, and referred to cases which indicated the varying effect of covenants using the same words, according as the words are to be applied to an old or a new house, and said :

> " It seems to me that *this is no case of contribution or* " *indemnity*, and therefore that the learned judge was

" right in refusing to give directions and that this appeal " must be dismissed."

Lopes, *J.*, concurred.

Speller vs. Navigation Co. (1884), 13 Q. B. D., 96. Plaintiff sued as indorsee of a bill of lading, signed by defendant's agent, for damage to sugar belonging to plaintiffs, shipped under such bills of lading on the steamship Dale. In the statement of claim the damage was alleged to have occurred, amongst other causes, *from the vessel not being seaworthy for the voyage*. The defendant obtained leave under Order XVI, rule 48, to issue a third-party notice to one Aitkin, on an affidavit *that the defendants hired the steamer Dale from Aitkin, and that he warranted the vessel, at the time of making the charter, to be tight, staunch, strong and every way fitted for the service*, and claiming an indemnity from him. Aitkin resided at Leith, Scotland, and defendant applied for leave to serve a third-party notice on him out of the jurisdiction. The order was refused at Chambers, and the defendants appealed. The motion was again refused. The defendant again appealed, and in the Court of Appeals, **Brett**, *J.*, 101, discussed the meaning of the word "*indemnity*" used in Order XVI, rule 48 (new rules), and contrasted Order XVI, rule 18 of the old rules, and pointed out that the new rule leaves out the words: "

" 'or other remedy or relief over' and " confines the right " to issue such notice to the case where a defendant claims " to be entitled to contribution or indemnity. It seems to " me that 'indemnity' in the new rule must have the same " meaning it had in the old rule, and *it can only apply " to the case where a third person has* **contracted** *to " indemnify* the defendant. In the present case it is clear " that there is no contract to indemnify. If the defendants' " case be true, *they may probably recover the* **same dam-** " **ages** *against the shipowner* of whom they chartered " the ship as the cargo-owner may recover against them, but " that is not enough to entitle them to give this third party " notice, inasmuch as to entitle them to do so *there must " be a contract to indemnify them*. What may be the result " as to the mode of trial of the second action, when both " actions are in existence, is not for us to say now. All " that we can say is that the defendants are not entitled to " issue a third-party notice, and I think that the construc-

"tion which Pollock, *B.*, in Pontifex *v.* Foord, put on the "present rule—Order XVI, rule 48—is the right one."

Bowen, *L.*, concurred, and said (102): "In this case the "defendants have *no claim to contribution*, nor have they "any claim to *indemnity* as such, *because they have no "contract or right to indemnity as such.* The mere cir- "cumstance that the damages which they may recover may "probably be the same as those which may be recovered "against them, does not convert either of the two contracts "into a contract of indemnity."

Fry, *L. J.*, concurred, saying: "it seems to me that the "defendants' claim is not for an indemnity."

Appeal dismissed.

Birmingham, etc., Land Co. vs. London & N. W. Ry. Co. (1886), 34 Ch. D., 261. One Boulton had agreed to grant building leases to the Land Co. The Land Co. agreed to erect 120 houses before Nov., 1885, and in default of doing so the reversioner was empowered to re-enter and determine the agreement as to all parts of the land of which leases had not been granted.

Pending applications for railway rights, an extension of the time to build was granted by B.

In 1883 B. agreed with the Rwy. Co. for a sale of parts of the land. The time for building having expired, the Rwy. Co. treated the agreement of B. with the Land Co. as at an end.

The Land Co. then brought this action, alleging that the Rwy. Co. had notice of the agreed extension of time, and bought subject thereto. The Rwy. Co. denied notice and claimed to be indemnified by B. against the Land Co.'s claim.

Defendant applied in chambers for leave to serve a notice under Order XVI. R. 48, on B., which Chitty, *J.*, refused.

"Chitty, *J.*, said (p. 267): "The defendant Company "claims to be entitled to an indemnity over against third "persons, not parties to the action, and so claiming applies, "to the Judge in Chambers to issue a notice to the third "parties in order to bring them in. * * The construction "which the defendant Company are seeking to put upon "this rule would really reduce to silence the condition in "the rule (Order XVI. Rule 48) that the notice must be "issued by leave of the Court or a judge.

"It comes to this, that a defendant would only have to "state that he *claims indemnity*, and then, as a matter "practically of right, he would be entitled to issue the "notice. * * It is not sufficient for him *to say* that he "wants to bring in the third party because there is an issue "between himself and such third party analogous to, or "the same as the issue between the plaintiff and the "defendant in the action.

"I take the simple case of there being covenants in an "under lease expressed in the same terms as those in a "superior lease. The question is whether the covenant to "repair has been broken or not.

"It might have been proper to provide in this rule that "all such questions should be tried in the same action.

"*But those who framed the rule in the first instance,* "*found that there* **was very good reasons** *to think* "*that the wide terms in which the old rule*—Order XVI, rule "17—*was expressed:*—that 'where a defendant is or claims to "'be entitled to contribution or indemnity, or any other "'remedy or relief over against any other person, or where "'from any other cause it appears to the Court or a Judge "'that a question in the action should be determined not "'only as between the plaintiff and defendant, but as "'between the plaintiff, defendant *and any other person*, "'or between any or either of them, the Court or a Judge "'may on notice being given to such last mentioned person "'make such order as may be proper for having the ques-"'tion so determined'—*were such that it would lead to em-*"*barrassment of the plaintiff in the litigation, and conse-*"*quently it has been cut down to its present more* **moder-**"**ate** *dimensions.*"

"Is there any ground for saying that *in a legal sense* the "defendants are *entitled* to indemnity against the Boulton "trustees? I am satisfied there is not. *They have no con-*"*tract express or implied for an indemnity*, nor have they "any equitable right to *indemnity*. If the defendants are "right in what they say they will be entitled to obtain "specific performance of the agreement of the 31st of July, "1883, from the Boulton trustees *with compensation* for a "defect in title. But that is not like it at all. They could "not bring in, on such a question as that, as part of *com-*

" *pensation* for the damages they have suffered, the loss they " have sustained by having defended it, and having de " fended it, I am assuming, unsuccessfully—That would " be no part of the *compensation*."

Application refused.

Defendants appealed, and the appeal was heard by Cotton, Bowen and Fry, and all agreed that there was *no agreement to indemnify* the defendant, and Cotton pointed out (p. 271) the difference between the Order XVI., R. 48, of 1883, and Order XVI., Rule 18 of 1875, where the words were: " Where the de- " fendant is or claims to be entitled to contribution or indemnity " *or any other remedy or relief* against any other person," pointing out that the words in italics above quoted were omitted in 1883; and Bowen, *L.J.*, said (p. 274): " *The present rule was* " *intended to* **cut down** *the old rule*."

Johnston vs. Salvage Association and McKiver (1887), 19 Q. B. D., 458. Deft. McK. insured his ship under a policy containing the usual suing and laboring clause. Plaintiff sued both ship-owner and insurer for services and work in attempting to save the ship Maggie Robertson and cargo.

McK. applied for leave to issue and serve a third party notice on the underwriters, the Home & Col. M. I. Co. and others, claiming to be indemnified by them against any liability in respect of any moneys the plaintiffs might recover against him in the action, on the ground that the underwriters had agreed by the policies of insurance to indemnify him from such liability.

The Judge at Chambers granted the order, and it was rescinded by the Divisional Court, and McK. appealed.

Lindley, *L. J.*, stated the nature and effect of the suing and laboring clause to be:

" A contract by which the underwriter agrees to pay " the assured the expense he may reasonably and properly " incur *in preventing a loss*, which, if it occurred, would " fall on the underwriter under the other clauses in the " policy. *Such a contract is not a contract of indemnity* " in any proper sense: it is a contract to pay the assured " expenses which he may incur—but not to indemnify him " against any *claims* made by other people against him."

" In equity a contract to indemnify can be specifically

" enforced before there has been any breach of the contract " as would sustain an action at law. In equity the plaintiff " need not pay and, perhaps, ruin himself before seeking " relief. *He is entitled to be relieved from liability.*

" But in this case, McK. would have no *locus standi* in " equity against the underwriters, if he were to seek specific performance of a contract to indemnify him against " Johnston & Co.'s demand. Assuming, therefore, that the " underwriters are liable to pay McK. for services and expenses under the suing and laboring clause, and assuming that these services and expenses are included in those " in respect of which Johnston is suing McK. I am of " opinion that this case is not within Order XVI., R. 48, " and that the underwriters cannot be brought in as third " parties under that rule."

The Master of the Rolls agreed.

Lopes, *L. J.*: " Under the old rules, before the recent " amendment, the defendant had a much larger power than " under the present rule to bring in a third party, against " whom he might claim some relief or remedy over.

" *The present rule was intended to curtail the old rule.*

" Under the present rule the defendant must make out a " *prima facie* case showing that he is entitled to *contribution* or *indemnity* against the third party. The defendant " here is not entitled to contribution; he must therefore " make out a *prima facie* case that he is entitled to indemnity.

" I am of opinion that he does not make out such a " case. I agree with what was laid down in the case of " Birmingham & District Land Co. *vs.* London & N. W. " Ry. Co., 34 Ch. D., 261, viz., that to bring a case within " the rule there must be a *direct right to indemnity*, **as** " **such**, a right which can be enforced at law *or in equity*.

* * *

" It seems to me that whatever may be the liability of the " underwriters to McK., the underwriters are in no way " bound either at law *or in equity* to indemnify him " against the claim of the plaintiff in this action or any part " of it. There is no contract by them either express or implied to undertake such a liability."

Dubout vs. Macpherson (1889), 23 Q. B. D., 340. Plaintiff sued as endorsee of two bills of exchange accepted by defendant. Defendant claiming to be *indemnified* by one Boisduval by reason of his having contracted to pay him 50 % of the proceeds of the acceptances when negotiated, applied at Chambers for leave to serve a third party notice, when issued, on Boisduval in France, where he resided.

The application was granted, but the case was sent back to ascertain *whether there was in fact a* **contract** *of indemnity*, and whether consequently a third-party notice should issue at all.

III.—The fifth reason given by Judge Brown is that the 59 Ad. Rule has been most useful *in cases of tort*.

When this Court in the case of "**The City of Hartford**," 97 U. S., 323, fixed the liability of *tort-feasors in solido*, and in the **Game Cock and Alabama**, 92, U. S., 695, established the law that the injured party should exact compensation from each *equally* if the vessels were worth it, and make up any deficiency from the more valuable, it did not change the law that had existed for ages, that *there can be no contribution between tort feasors*.

The form of the libellants' final decree was modified, and that was all. The same result follows under the 59 Ad. Rule. As between the *tort-feasors*, neither gets a *decree over* against the other.

IV.—Judge Brown's sixth reason is that no "*inconvenience*" was shown by the charterer.

This is a funny "*reason*."

I say to the Judge, you have *no jurisdiction* to do so and so, and he answers: "Will it *inconvenience* you if I insist on doing it? You attack my **right** to do it, and I want you to show me that it will *inconvenience* you."

Dec. 1st, 1894.

Respectfully submitted,

GEO. A. BLACK,
Of Counsel for N. Y. & P. R. SS. Co.,
44 Pine street,
N. Y.

Form D., 1892. 1

MILLER, BULL & CO.,
NEW YORK.
Cable Address, "DAFTON"—New York.
Use Watkins' Code and Appendix.

Claimant's Exhibit 1.

TIME CHARTER.

This Charter Party, made and concluded upon in the City of NEW YORK, the 27th day of September, 1892, between J. M. Ceballos & Co., agents for owners of the good British Steamship called *Centurion*, of Sunderland, 1942 Tons gross Register, and 2
1233 Tons net Register, 170 horses power, provided with Steam Winches and Board of Trade Certificates for Hull and Machinery classed 100A, 1. Br. at Lloyd's Years; warranted to carry abt. 3050 Tons dead weight and abt. 3550 tons measurement inclusive of bunkers now trading and The New York & Porto Rico SS. Co. Charterers.

WITNESSETH, that the said Owners agree to let, and the said Charterers agree to hire the said Steamship for the term of Six Calendar Months from the day of her being (after docking and cleaning bottom) placed at the disposal of the Charterers, at New York, in such Dock or at such Wharf or place (where she may always safely lie afloat, at all times 3
of tide), as Charterers may direct, she being then ready to receive Cargo; and being tight, staunch, strong, and every way fitted for the service, having Water Ballast and Steam Winches and Donkey Boiler, with capacity to run all the Steam Winches, at one and the same time, and necessary dunnage (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage); to be employed in carrying LAWFUL MERCHANDISE, including Petroleum, or its products, mails (and passengers, so far as accommodations will permit) between—United Kingdom, Continent of Europe,

United States, Central and South America (not south of the River Plate), West Indies, Gulf of Mexico, Brazils and St. Lawrence excluded, as the Charterers or their Agents shall direct, on the following conditions:

Owners to have option of docking ship in United Kingdom before she sails to enter upon this charter.

1. That the Owners shall provide and pay for all the provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the Vessel; also for all Ship, Cabin, Engine-room and Deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service, and victual and provide for all passengers in the best manner, according to their class. Charterers to pay for victualing Cabin Passengers at the rate of , for Steerage Passengers per day for each adult; children half price.

2. That the Charterers shall provide and pay for all the Coals, Port Charges, Pilotages, Agencies, Commissions, and all other Charges whatsoever, except those before stated. That the Charterers shall accept and pay for all Coal in the Steamers' Bunkers on delivery, and the Owners shall, on the expiration of this Charter Party, pay for all Coal left in the Bunkers, each at the current market prices at the respective Ports when she is delivered to them.

3. That the Charterers shall pay for the use of said Vessel Seven Hundred & forty pounds Sterling (£740) lump sum per Calendar Month, commencing at 12 o'clock noon (after entry at the Custom House) with clear holds at Charterers' disposal, as above, and after the same rates for any part of a Month used to complete a voyage; hire to continue from the time specified for terminating the Charter, until her delivery to Owners (unless lost) at a Port on the East Coast of the United States, North of Hatteras. The Steamer to be delivered to the Charterers not before January 10th, 1893, Charterers to have

A true copy of the Original Stamped Charter Party for my possession.

option of cancelling this Charter if Steamer is not delivered as above on January 25th, 1893.

4. Payment of said Hire to be made in Cash at New York at the current short sight rate of Exchange, monthly in advance; and in default of such payment the Owners shall have faculty of withdrawing the said Steamer from the service of the Charterers without prejudice to any claim they, the Owners, may otherwise have on the Charterers, in pursuance of this Charter.

5. That should the Steamer be on her voyage toward the port of return delivery, at the time a payment of hire comes due, said payment shall be made for such a length of time as Owners' Agents and Charterers or their Agents, may agree upon as the estimated time necessary to complete the voyage; and when the Steamer is re-delivered to Owners' Agents, any difference shall be refunded by Owners, or paid by Charterers, as the case may require.

6. That the cargo or cargoes shall be loaded and discharged in any dock, or at any wharf or place that Charterers may direct, where the Steamer can always safely lie afloat. Steamer to work night and day if required by Charterers, and all Steam Winches to be at Charterers' disposal during loading and discharging. Steamer to provide men to work Winches, both day and night if required, Charterers agreeing to pay the Winch men for work done at night; in the event of short steam or a disabled Winch or Winches, Owners to pay for shore engine or engines required in lieu thereof.

7. That the whole reach, burthen and passenger accommodation of the Ship (not being more than she can reasonably stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for the Ship's officers, crew, tackle, apparel, furniture, provisions and stores.

8. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with Ship's crew, winches and boats, and proceed to Sea when ordered, or on the

next tide, unless prevented by sufficient reasons, which shall be furnished in writing to the Charterers.

9. That whilst the steamer is in West Indian, Central or South American ports the crew shall not be allowed on shore. The Ship to be liable for any delay of quarantine arising from a violation of this clause.

10. That the Owners shall be liable for time lost by any detention by Customs authorities caused by smuggling on the part of officers or crew.

11. That the Steamer shall be docked, scraped and painted at least once in each six months during the continuance of this Charter. Time lost in docking to be allowed to Charterers.

12. That the Captain shall be under the orders and direction of the Charterers, and shall sign Bills of Lading as presented (the act of God, the Queen's enemies, fire, restraint of Princes, rulers and people, and all other dangers and accidents of the seas, rivers and steam navigation being excepted therein), at any rate of freight without prejudice to this Charter; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading by the Charterers' instructions.

13. That if the Charterers should have reason to be dissatisfied with the conduct of the Captain, Officers or Engineer, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointment.

14. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which is to be patent to Charterers or their agents, and at the end of each round trip the Captain shall give an abstract copy of the same to the Charterers.

15. That the Charterers shall have permission to appoint a Supercargo and Purser, who shall accompany the Steamer, and be furnished with first-class

fare and accommodation, free of charge to Char- 13
terers and see that the voyages are prosecuted with the utmost dispatch.

16. That the Charterers shall have permission to put in additional ventilating arrangements, if desired, but the ship to be returned to owners in the same condition as when delivered, unless Owners desire to retain the new arrangements, remunerating Charterers for the expense.

17. Owners to provide rope, falls, block and slings necessary for handling ordinary cargoes up to three ton weight.

18. That the Charterers shall have the option of continuing the Charter for the further period of six months on giving notice thereof to Owners Fifteen 14
days previous to expiration of each named term.

19. That loss of time from a deficiency of men or stores, or from any defect or break down of machinery, damage or accident to the vessel, which prevents the working of her for 24 hours, shall be for account of the Owners, and in such case the payment or hire shall cease from the commencement of the loss until she be again in a proper and efficient state to resume her service and should she in consequence put into any other Port other than that to which she is bound, the Port Charges and Pilotages at such Port shall be borne by the Steamer's Owners; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, 15
such detention or loss of time shall be for the Charterers' account.

20. That should the vessel be lost, any hire paid in advance, and not earned (reckoning from the date of her loss), shall be returned to the Charterers, with interest from date of loss. The act of God, the Queen's enemies, fire, restraint of Princes, rulers and people, and all other dangers and accidents of the seas, rivers and steam navigation shall excuse a compliance with this Charter.

21. That the Charterers shall not be responsible for losses incurred by reason of the default or neg-

16 lect of the Pilot Master or crew in the navigation or management of the Ship—including damages by collision; but no claim to be made against Owners for loss of Cargo.

22. That the Owners shall haue a lien upon all sub-freights, for charter money due under tthis Charter; and Charterers shall have a lien on the Ship for cash advanced and for all charter-money paid that has not been earned.

23. All derelicts, salvage and towage to be for Owners' and Charterers' equal benefit. Penalty for non-performance of this contract, estimated damages.

24. That should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons in the United
17 States, one to be appointed by each of the parties hereto and the third by the two so chosen, their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award this agreement may be made a rule of Court.

25. Five per cent. commission on gross amount of this Charter is due, on signing of this Charter Party, to J. M. Ceballos & Co., Steamer lost or not lost, Charter cancelled through steamer missing cancellation date, or any fault of owners in keeping with this Charter Party.

26. An address commission of 2½% is payable by owners to The New York & Porto Rico Steamship Co.
18 By cable authority from Messrs. Wrenn & Co.

Dated, London, Sept. 27th, 1892.

(Sgd.) J. M. Ceballos & Co.,
Agents.

" The New York & Porto
Rico Steamship Co.,

Henry T. Knowlton,
Treasurer.

Signed in the presence of:
(Sgd.) Fred. R. Rohl.
Signed in the presence of:
(Sgd.) C. Alex. Cook.

Office Supreme Court, U. S.
FILED.
DEC 17 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

IN THE MATTER OF THE PETITION

OF

THE NEW YORK AND PORTO RICO STEAMSHIP COMPANY, FOR A WRIT OF PROHIBITION.

BRIEF IN OPPOSITION.

CONVERS & KIRLIN,
Proctors in Opposition,
5 Beekman Street, New York.

J. PARKER KIRLIN,
Of Counsel.

Supreme Court of the United States.

IN THE MATTER OF The Petition of THE NEW YORK, AND PORTO RICO STEAMSHIP COMPANY for a Writ of Prohibition.	BRIEF IN OPPOSITION.

Statement.

This matter comes on to be heard upon the following papers:

(1.) A libel by the American Sugar Refining Company and John B. Gossler against the steamship *Centurion* to recover damages to certain hogsheads of sugar transported in the *Centurion* from ports in Porto Rico to New York, under certain bills of lading.

(2.) A petition by John Blumer & Co., claimants and owners of the *Centurion*, showing that liability for the damages, if there be any liability, was primarily that of the New York and Porto Rico Steamship Company, charterers of the vessel, through whose fault, if any, the damages were sustained, and praying that said charterers be

brought in as defendants, and the direction of the District Judge that process issue, pursuant to the prayer [Charter party annexed to Petitioner's Brief.]

(3). Process issued under the petition.

(4.) The exceptions, on the part of the New York and Porto Rico Company, to the jurisdiction of the Court and the memorandum opinion, and order overruling the exceptions.

(5.) The answer of the shipowners to the libel.

(6.) The answer of the libelant to the shipowners' petition.

(7.) The petition for the writ of prohibition.

(8.) The return of the Hon. Addison Brown, United States District Judge for the Southern District of New York, to the order to show cause, issued by this Court.

The faults alleged as the ground of claim in the libel (paragraph third) are:

(1) Negligent and improper stowage.

(2) Want of proper care on the part of the master, officers and crew, or of the agent of said vessel, and the persons employed by him.

(3) Failure properly to clean the hold and bilges for the cargo before loading it.

(4) Omission to close the hatches between certain molasses, which was stowed in the between-deck, and sugar stowed in the lower hold.

(5) Neglect on the part of the officers and crew to use the pumps on the voyage.

It is further alleged that in consequence of these specified faults, the contents of certain hogsheads of molasses which broke adrift on the voyage, either through stress of weather or improper stowage, ran down and collected

in the lower hold, washing out part of the sugar from the hogsheads and damaging the remainder.

The petition of the shipowners (par. 3d) shows that at all the times mentioned in the libel, the steamer was hired out under a charter of demise to the New York and Porto Rico Steamship Company; that the cargo in question was laden and stowed under the care and direction of the servants of the charterers, and that if there was any negligence in and about the loading and stowage or care of the cargo, as alleged in the libel, such improper stowage, negligence and want of care was on the part of the servants of the time charterers and not on the part of the master, officers and crew of the steamship.

The relief prayed was that process according to the course of cases in admiralty and maritime jurisdiction should issue against the New York and Porto Rico Steamship Company, citing it to appear and answer the petition and the libel, and that the Court would pronounce against the charterers, instead of against the steamship, in case the allegations of the libel should be proved and sustained, or that the Court would grant such other relief as the petitioners (shipowners) might be entitled to receive.

Upon the return of this process, the charterers appeared and objected to the jurisdiction of the Court, upon the following grounds:

"1. That this Court has no jurisdiction in admiralty to entertain such petition.

"2. That upon the face of said petition, it does not set forth any case wherein process ought of right to issue against the New York and Porto Rico Steamship Company."

Upon the hearing of these exceptions, the proposed answer of the claimants to the libel [substantially similar to the answer in the preceding case of *The Centurion*, 57 Fed. Rep., 412] was stated (*Return*, fols. 7, 9-23), and the exceptions were overruled, the learned District Judge following his own decision on the same point in the *Alert*,

40 Fed. Rep., 836. His memorandum opinion disposing of the matter, was as follows:

"I cannot sustain either of the within objections, and no such inconveniences are made probable as should lead to the disallowance in this instance as a matter of discretion."

The charterers then obtained from this Court an order to show cause why a writ of prohibition should not issue, prohibiting the District Court from taking jurisdiction of the petition under which the charterers were brought into the suit of the libelants against the *Centurion*, and obtained an extension of time to answer the petition until after the final disposition of the application for prohibition (*Return, fol.* 8).

The RETURN made by the District Judge to the order to show cause, states that the order and citation to make the New York and Porto Rico Steamship Company a party defendant were issued —

1. Because in the libel it was alleged that the damage to the sugars in question arose from different alleged acts of negligence, for some of which, if established, it appeared by the petition of the owners of the *Centurion* that the New York and Porto Rico Company would be primarily liable and bound to indemnify the shipowners.

2. Because the presence of the New York and Porto Rico Company was deemed necessary to the due administration of justice,

(*a*) to avoid a multiplicity of suits,

(*b*) to secure a complete hearing of the subject matter through the presence of all the parties interested,

(*c*) to obtain an adjudication which would do justice to each and be binding upon all,

(*d*) to avoid conflicting decisions to which separate suits would be liable through different evidence likely to be produced in them when the parties were different, and thus to avoid any possible failure of justice through such causes and any discredit to the administration thereof.

3. Because the case, though not within the letter, was deemed to be within the spirit of the 59th Rule of the Supreme Court in Admiralty.

4. Because the order of this Court to bring in the New York and Porto Rico Company as defendant at once, instead of requiring the owners of the *Centurion* to wait until after a judgment against them before filing an independent libel against the said company, in case negligent stowage was established, was, in the absence of any express rule on the subject by the Supreme Court, deemed to be,

(*a.*) within the limits of the authority of the District Court as conferred by Section 918 of the Revised Statutes, whereby it is "authorized to regulate its own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings,"

(*b.*) and also as conferred by the 46th Rule of the Supreme Court in Admiralty, authorizing the District Court in cases "not provided for by the previous rules," to regulate its practice "in such manner as it shall deem most expedient for the due administration of justice in suits in Admiralty."

[Of these considerations a fuller statement has been given by the learned District Judge in the case of the *Hudson*, 15 *F. R.*, 162, and the *Alert*, 40 *F. R.*, 836, to which he makes reference.]

5. Because constant resort to the 59th Rule in innumerable instances has been found in practice most useful in preventing abuses, and in general extremely satisfactory, and the occasional application of the rule to other cases of negligence or tort, closely analogous to those expressly covered by the 59th Rule, has proved equally conducive to the most speedy and satisfactory distribution of justice.

6. Because no inconvenience to the New York and Porto Rico Company was shown or even averred to be likely to arise, such as might lead the Court in its discretion to withhold the relief asked for by the defendant shipowners (*Return, fols.* 3–7).

POINTS.

I.

The petitioners are not entitled to the writ in this case as a matter of strict right.

Whether the granting or refusal of the writ of prohibition is discretionary or a matter of right has been the subject of much discussion. The rule in that matter has been stated by this Court to be, that the granting of the writ is discretionary "where there is another legal remedy by appeal or otherwise, or where the question of jurisdiction of the Court whose action is sought to be prohibited is doubtful or depends upon facts which are not made matter of record; * * * but where that Court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to the jurisdiction at the outset and *has no other remedy*, he is entitled to the writ of prohibition as a matter of right * * * "

Smith v. *Whitney*, 116 U. S., 167, 173.
Ex parte Cooper, 143 U. S., 472, 495, 513.

In *Re Fassett*, 142 U. S., 479 (at p. 486), Mr. Justice BLATCHFORD, in delivering the opinion of the Court, said:

"As the District Court in the present case has jurisdiction in the premises, we will not prohibit it from proceeding in the exercise of such jurisdiction. A writ of prohibition is not intended to take the place of exceptions to the libel for insufficiency, and will issue only in case of a ~~writ~~ of jurisdiction either of the parties or the subject-matter."

In *Ex parte Morrison*, 147 U. S., 14, 26, Mr. Justice BLATCHFORD, in delivering the opinion of the Court, refusing the application for a mandamus, said:

"Moreover, the present attempt is one to use a mandamus as a writ of error, which cannot be done. * * * In addition to this, a mandamus is never granted where the party asking it has another remedy. * * * In the present case it is claimed by Morrison that the jurisdiction of the District Court in New York was in issue before that court. If so, the remedy of Morrison was by an appeal from the District Court directly to this Court on the question of jurisdiction, under Section 5 of the Act of March 3, 1891, Ch. 517 (26 Stat. at L., 827)."

Clearly, the petitioners have at least two other remedies in the present case. If the District Judge has erred in taking jurisdiction of the petition, his error can be corrected by an appeal directly to this Court; or, if defeated, he can appeal to the Circuit Court of Appeals upon the whole case, and that Court, if so advised, may certify the question of the jurisdiction to this Court for its decision.

United States v. *John*, 155 U. S.——

Can it be said that the absence of jurisdiction of the District Court in this case is beyond doubt? The libel is based upon a bill of lading issued by a servant of the charterers of the steamer who issued it in virtue of authority conferred by a charter party; that charter party (annexed to the petitioners' brief) is alleged in the petition to be the basis of the claim made by the shipowners to receive indemnity from the respondents for any sum they may be compelled to pay by reason of the respondents' negligence in and about the transportation of the cargo. General jurisdiction of the District Court over suits arising out of charter parties is undoubted, and it had jurisdiction of the parties. Had the shipowners waited until a decree passed against them for the libelants' damage, and then brought suit against the charterers to recover from them the amount of such damage, under the provisions of the charter party, it will hardly be contended that the District Court would have been without jurisdiction of the cause. The real complaint, therefore, does not appear really to touch the jurisdiction of the Court, but is against its practice; it is that the District Court has adopted the practice which would have prevailed in Equity of trying the whole matter at once; of ascertaining first whether there was any liability to respond for the libelants' demand, and if so, determining whose fault occasioned the liability, and adjudicating upon the respective rights and obligations of shipowners and charterers under the bill of lading and charter party, and placing the blame where it belonged in a single proceeding.

In many previous instances, where it appeared that the Court had jurisdiction of the parties, and generally over the subject matter of the litigation, this Court has declined, on an application for a prohibition, to decide the question of jurisdiction, but has permitted the Court below to decide the case, and left the applicant to correct errors or irregularities by appeal.

Ex parte Easton, 95 U. S., 68.
Ex parte Gordon, 104 U. S., 515.
Ex parte Ferry Company, 104 U. S., 519.
Ex parte Hoger, 104 U. S., 520.
Ex parte Pennsylvania, 109 U. S., 174.
Ex parte Boyer, 109 U. S., 629.
In re Fassett, 142 U. S., 479, 486.
Ex parte Sturges, referred to *in re Fassett*, 142 U. S., 479, p. 484.

This practice also obtains in the English courts.

In *The Charkieh*, *L. R. 8 Q. B.*, 197, where the suggestion on an application for a prohibition was that in a case of collision between the *Charkieh* and the *Batavier*, the Court of Admiralty had no jurisdiction because the *Charkieh* was the property of the Khedive of Egypt, and was a ship of the Egyptian branch of the Turkish navy, carrying the Ottoman naval pennant, the Court refused the prohibition, holding that the Admiralty Court was competent to pass on such defense, and if its decision was erroneous, it could be corrected by the Privy Council on appeal.

Lord Chief Justice COCKBURN, delivering judgment, said:

"There, therefore, is a further question whether or not a vessel belonging to a foreign potentate, but not used as a vessel of state or a vessel of war, is entitled to the immunity which ships of war and ships used for the purposes of government enjoy. This is a question peculiarly within the province of the Court of Admiralty to decide. Why are we to find that the Court of Admiralty cannot deal with it? If it entertains the suit, there is an appeal to the judicial committee of the Privy Council—a court of the highest authority. I feel disinclined to grant the

writ for a prohibition in a case where the facts are in doubt, and the Court whose jurisdiction is sought to be impeached is just as competent to determine the question as we are. * * * But both the facts and the law are within the jurisdiction of the Court of Admiralty, and that Court is perfectly competent to decide them."

Lord BLACKBURN said:

"It does seem to me that the Court of Admiralty has jurisdiction to determine the facts and to decide whether international and maritime laws do allow the circumstances stated to be a defense to a claim against the *Charkieh;* and if that Court be wrong, the Privy Council can set it right, and their decision would be final. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the suit as a question of international law, and taking that view of it, I think the Court ought not to be prohibited."

The only recent case where the Court has decided the question of jurisdiction and determined the suit by a prohibition is *Ex parte Phœnix Ins. Co.*, 118 U. S., 610, where the absence of jurisdiction was obvious.

II.

No valid reasons are assigned for the granting of the writ as a matter of discretion.

The grounds upon which the petitioners appear to ask for the writ as a matter of favor, are:

1. That in a previous case [arising upon the same voyage and out of the very facts and grounds of negligence charged in the pleadings in this case] "a similiar practice was allowed by the District Judge, and this same charterer brought in to answer a petition of the shipowner and a libel of the cargo for damage with disastrous results to the charterer" (*Brief for Petitioner on Motion for Leave to File the Petition, page* 6; *The Centurion*, 57 *Fed. Rep.*, 412).

2. That if the claimants were left to defend the principal suit alone and failed, owing to their inability to introduce their log book as evidence *in their own behalf* to establish that the loss was occasioned by perils of the sea, and were adjudged to pay libelants' damages on the ground that they arose from improper stowage; nevertheless in a subsequent action over by the shipowners against the charterers to recover the damages so paid, upon an averment that they were occasioned by the charterers' negligence, the ship's log book, which shows sea perils were encountered on the voyage, would be evidence of the most authentic kind *against* the shipowners, and that a Court hearing such subsequent suit and construing the log against the shipowners might find that the loss was fairly ascribable to perils of the sea rather than to improper stowage by the charterers, and for that reason leave the shipowners to bear the loss. This result the petitioners appear to think would be *just*; and is the end they expect to achieve by applying for this writ (*Brief for Petitioner, pages 5 and 6; Brief for Petitioner on Motion for leave to file Petition, page 6*).

It was to avoid such a result, which would be a "failure of justice," tending to bring "discredit to the administration thereof," that the District Court took jurisdiction of the petition (*Return*, fol. 4).

By referring to the "disastrous results" to them which followed, a similar practice in a previous case of the *Centurion*, 57 Fed. Rep., 412, the petitoners have unwittingly (perhaps) betrayed the real reason of their anxiety to obtain the writ.

The Court will observe by comparing the dates mentioned in the pleadings with the dates mentioned in the opinion of the District Court, 57 Fed. Rep., 412-416, and the charges of fault in these pleadings with the faults charged and found in the previous case, that the issues now raised were all considered and decided in the previous case, the only difference between the two causes being that in the other, the American Sugar Refining Company and one *Bregaro* were libelants, whereas, as in this case, which arises upon a different consignment of cargo stowed in the same hold, on the same voyage, the American Sugar

Refining Company and *Gossler* are libelants. The District Court, after a most careful trial on full evidence and elaborate arguments, reached the conclusion that the damage was primarily due to improper stowage by the servants of the charterers, and made a decree adjudging the steamship liable to the libelants for the loss, and adjudged that the respondents, as primarily liable, should pay the decree; and in default thereof that the claimants have judgment and execution against them for any amount they might be compelled to pay under the decree to the libelants [thus modifying slightly the first clause of the concluding paragraph of the opinion].

It thus appears that both the reasons assigned by the petitioners for the exercise of the discretion of this Court in their favor are really the soundest of reasons why, in so far as the granting of the writ may be a matter of discretion, it should be exercised against them.

III.

The practice followed by the District Court was within its power under the Revised Statutes and the rules of the Supreme Court.

The provisions of the Revised Statutes, touching the power of the District Court in the premises, are as follows:

"Sec. 913. The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States.

"Sec. 917. The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts.

"Sec. 918. The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

Rule 46 in Admiralty, covering questions of practice not expressly provided for in the rules of the Supreme Court, reads as follows:

"In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty."

The rules made by the Supreme Court, pursuant to the quoted provisions of the Revised Statutes, are regulations of practice, neither giving nor prohibiting any exercise of jurisdiction in the lower courts which they would otherwise be entitled to exercise.

The St. Lawrence, 1 Black, 522, 526.

The action of the learned District Judge, who is now sought to be prohibited, in instituting the practice that where one of two vessels liable for a collision was sued alone, such vessel should be allowed to bring the other into the suit as a party-defendant, was certainly a more radical change of the practice then existing than taking jurisdic-

tion of the present petition would be of the practice now existing, yet that was not deemed to be a matter of jurisdiction.

The Hudson, 15 Fed. Rep., 162.

This Court clearly recognized it as a matter of *practice*, and shortly afterwards sanctioned it as such and made it general by the adoption of *Admiralty Rule* 59.

If it be conceded that bringing in a charterer by petition be also a matter of practice, then there can be no doubt that under the sections of the Revised Statutes above quoted, and Rule 46, and in the absence of any rule by the Supreme Court governing the matter, the District Court has ample power to make either a special or a general rule authorizing the course here followed.

The Epsilon, 6 Ben., 378, 389.

It has not been intimated in any judicial ~~position~~ opinion that the District Court was without power to establish the rule adopted in *Hudson* (*supra*), and it appears to have been the purpose of the Supreme Court in making a rule (59) on the subject to provide that the practice adopted in the *Hudson* for the Southern District of New York should be the general practice in the other districts of the United States.

It was partly because of the near analogy of the practice here adopted, with that sanctioned by the 59th rule, and because the reasons behind the rule were equally applicable here, that the District Court entertained the claimant's petition.

This was not the first time that the application of this practice to other cases of negligence or torts than those specified in the 59th rule was adopted.

In the *City of Lincoln*, 25 Fed. Rep., 835, a wharfowner was brought into a suit by a consignee of cargo against the steamship for damage arising from unloading the cargo upon a defective pier, in consequence of which it fell into the water and was damaged; and upon a finding that the steamship and the wharfowner were both in part responsible for the accident, the libelants were adjudged

to recover half their damage from the wharfinger and half from the steamship.

In *Joyce* v. *Canal Boats*, 32 Fed. Rep., 553, where the libelant's vessel in landing at a wharf ran upon two vessels recently sunk, which he libeled for the collision, the claimants of the vessel sued brought in the wharfinger as co-defendant by a petition alleging that he caused the vessels to be sunk by negligently mooring and leaving them unprotected, and giving no notice of the danger. The Court entertained the petition as within the general scope and purpose of the 59th rule, although, perhaps, not strictly within its letter.

In *The Alert*, 40 Fed. Rep., 836 (in a learned opinion printed at the end of this brief), the Court held that in an action *in rem* against a chartered ship for damage to cargo, the charterers may, on the claimant's petition, showing that the damage arose from the charterer's fault, be made parties defendant on the analogy—the exact point here in question—of *The Hudson*, 15 Fed. Rep., 162, and of Rule 59 in Admiralty. At a subsequent stage of the cause on finding that the presence of the charterer in the case would unnecessarily delay the suit and prejudice the *libelant* (owing to delay in charterer's securing evidence), the Court severed the proceedings, permitting the libelant to go to judgment against the *Alert*, and reserving the question of the liability of the charterers over to the owners of the *Alert*, under the petition for subsequent determination. The claimants of the *Alert* thereupon appealed to the Circuit Court of Appeals for the Second Circuit, claiming that the Court below did not decide the whole case and determine the rights of all the parties thereto, and that, therefore, the cause should be remitted to the District Court for the purpose of a complete adjudication of the rights of the co-defendants, as between themselves.

The Court of Appeals (61 Fed. Rep., 113, 115) apparently approved the practice adopted by the District Judge, and on the point mentioned held as follows:

"The retention of the libel in the District Court, for the purpose of an ascertainment of the rights of the claimants to an indemnity from the co-defendant, does not prevent

the decree which was made from being a finality, and presented no adequate reason for delaying its execution. The fact that the claimants have brought the charterer into the case so that the questions between them as to the amount of the damages which each might ultimately bear can be adjudicated in one suit, does not call upon this Court to remit a final decree, as between the parties thereto, to the District Court for further delay."

In Point III. of the petitioners' brief it is suggested the statement in the Judge's return (*fol.* 6), that "the constant resort to the 59th rule in innumerable instances has been found in practice most useful in preventing abuses and in general extremely satisfactory, and that the occasional application of the rule to other cases of negligence or tort closely analogous to those expressly covered by the 59th rule has proved equally conducive to the speedy and satisfactory distribution of justice," is at war with the decisions of this Court in the *City of Hartford*, 97 U. S., 323, and the *Alabama* and the *Gamecock*, 92 U. S., 695; the implication of what is said being that an opinion entertained by the learned District Judge (*The Hudson*, 17 Fed. Rep., 162, 167, *et seq.*), to the effect that a vessel held solely responsible for a collision due in part to the fault of another might obtain contribution from that other in an action over against it, conflicts with the axiomatic expression that "there can be no contribution between tort feasors" (*Petitioners' Brief, page* 25), and therefore requires correction by this Court.

It is unnecessary to discuss that matter at length here, for the reason that the shipowners' claim against the charterers, as stated in the pleadings, rests upon and grows out of the contract of charter, and is not an effort to obtain contribution as between tort feasors. If it were such an attempt, based upon an allegation that the damage was due to involuntary torts committed both by the shipowners and the charterers, the petition, it is submitted, would still be maintainable. That there may be such a thing as contribution between tort feasors appears to be a necessary inference from the decisions of this Court, holding that under cross-libels for collision,

where a division of damages has been adjudged, the decree should provide for a partial recovery of damages by the vessel which has suffered most from the one which has suffered least; and the same principle appears to underlie the very decisions with which the opinion of the District Judge is claimed to be at variance.

In the *Gulf Stream*, decided by the Circuit Court of Appeals for the Second Circuit, December 3, 1894 (affirming the decision of the District Court, in 58 Fed. Rep., 604), it appeared that one of the parties before the Court in a case of collision purchased, at a discount, damage claims for injuries to cargo on his own vessel. Both parties were afterwards held to be in fault. The party who had purchased the cargo claims at a discount endeavored to recover, on the basis of the actual amount of the cargo loss, $3,350, instead of on the basis of what he had paid for the claims, or $1,150. The District Court held that he should recover only on the basis of what he actually paid for the claims, and the Circuit Court of Appeals confirmed that view.

WALLACE, Circuit Judge, in delivering the opinion of the Court, said:

"The common law rule, by which there is no contribution between wrongdoers, is not applied by courts of admiralty in cases of collision caused by the mutual fault of two vessels; but as an incident of the moiety rule, adopted for the better distribution of justice between mutual wrongdoers, by which each side must bear the damage in equal parts, the one suffering least is decreed to pay the other the amount necessary to make them equal—that is, one-half of the difference between the respective losses sustained (*The Alabama and The Gamecock*, 92 U. S., 695; *The North Star*, 106 U. S., 17). It necessarily results that they stand in the position of sureties towards one another as respects the claim of a cargo owner whose goods on board one of the vessels have been lost by the collision. The cargo owner may pursue either wrongdoer and recover his whole loss from one notwithstanding as between themselves each is primarily liable for half. The one who is thus compelled to pay the whole loss is in effect a surety for the other to the extent

which the latter should contribute. Because the loss is a common burden, the owner of either vessel may remove it, and become entitled to contribution against the other."

IV.

The procedure adopted in this case is analagous to the former practice in equity, to the new procedure in England, and to the practice obtaining in countries whose procedure is based upon the civil law. It obviates the possibility of conflicting decisions upon the same matter, avoids circuity of action, and, in general, is conducive to the most speedy and satisfactory distribution of justice, without unnecessary inconvenience to either of the parties, and should therefore be sustained.

The bill of lading under which the sugar described in the libel was agreed to be transported in the *Centurion* from Porto Rico to New York, and which embodied the contract for an alleged breach of which the libel was filed, was the contract of the New York and Porto Rico Steamship Company, not the contract of the shipowners.

The charter-party under which the vessel was hired for a fixed period of time, was a charter of demise, not of affreightment. The owners of the vessel were to receive the hire irrespective of whether any cargo was carried in the ship or not (*The Turgot*, 11 P. D., 21, 24), provided they kept her seaworthy and in a fit condition for the service, and kept her manned, victualed and equipped (*Charter, fols.* 6, 7, 3, 4).

The only difference between this and the ancient form of demise charters is that formerly the charterers hired the bare ship, whereas in this case they hired the ship with the crews on board for purposes of navigation and to care for and manage the ship's machinery and appliances (*Charter, fols.* 4, 8, 9, 14, 15–16). All port charges were to

be paid by the charterers who were to load and stow the vessel at their own risk and expense (*fols.* 5, 9, 12, 16). That it was understood any bills of lading signed for cargo carried in the ship were to be the charterers' and not the owners' contracts was shown by Clause 12 (*fol.* 11), under which the charterers agree to indemnify the owners against the consequences of the captain's "signing bills of lading by the charterer's instructions;" and further by the clause which provides:

"No claim to be made against owners for loss of cargo" (*Charter*, fol. 16).

This form of charter-party has all the elements of a demise, and has generally been so construed.

The India, 21 Blatch., 268.
The Bombay, 38 Fed. Rep., 512; *on appeal*, 863.
The Centurion, 57 Fed. Rep., 412.
Donahue v. *Kettle*, 1 Cliff., 135.
Richardson v. *Windsor*, 3 Cliff., 395.
The Erin, 3 Ware, 225.
Winter v. *Simonton*, 3 Cranch, C. C., 104.
Leary v. *U. S.*, 13 Wall., 607.
The Francis Wright, 105 U. S., 381.
Marcardier v. *Chesapeake Ins. Co.*, 8 Cranch, 39.
The Enchantress, 63 Fed. Rep., 272.

It was the charterers, not the owners, who under this charter were engaged in the business of common carriers.

The black-faced statement (Brief for Petitioner on Motion for Leave to File Petition, page 5) that "there is no allegation and no pretense that the charterers are liable to the libelants," is denied (see *Return*, fols. 18, 19; and Prayer of the Shipowners' Petition).

The libelants could, without doubt, have proceeded *in personam* against the charterers and recovered for any breach of the expressed or implied obligations of the bill of lading; but they could not have recovered on that contract against the shipowners *in personam*.

Baumwoll Manufactur von Schiebler v. *Furness*, 1893, App. Cas., 8.
The Castlegate, 1893, App. Cas., 38.

They could also have proceeded *in rem* against the vessel and *in personam* against the charterers in one libel, the bill of lading being the charterers' contract.

Instead of proceeding against the charterers or joining them in their libel against the vessel, libelants went against the steamship *in rem* alone, on the authority of *The Freeman* v. *Buckingham*, 18 Howard, 182, in which this Court held that a bill of lading signed by the master, who was charterer, *pro hac vice*, although not the owners' contract, nevertheless bound the ship. In the previous case between these parties, the District Court held it was immaterial that the bill of lading was signed by the charterers' purser instead of the master.

The Centurion, 52 Fed. Rep., 412.

The Circuit Court of Appeals for the Second Circuit has held this secondary liability of the shipowners to be a relation of suretyship, and that the rules and equities obtaining in cases of principal and surety are applicable to cases of this nature.

The Enchantress, 63 Fed. Rep., 272.

Where, therefore, a libelant founds his suit against a surety upon a contract in which the charterer is principal, alleging negligence in regard to matters done and performed by the latter's servants as to which inferentially he would have facilities for defense superior to those of the shipowners—it is equitable and just that he should be brought into the cause before judgment in order that the shipowner (surety) may have the benefit of his assistance in defending the claim. If the shipowners were required to defend alone without the aid of the evidence of the charterer's servants, who would, no doubt, be held back to testify in the subsequent suit which the shipowners would be compelled to bring to recover the damages they might be forced to pay on account of the charterer's neglect, it might very well happen that for the want of the evidence of the charterer's servants the shipowners would fail to establish their defenses in the principal case, and yet that the charterers, upon production of that evidence in the suit

the shipowners over against them would establish their freedom from fault; in other words, that the same matter, upon different proofs, would be found to be negligence and not to be negligence, and the shipowners, although actually free from fault, would be condemned to suffer the results of such a miscarriage of justice.

The Enterprise, 3 Wall., Jr., 169.

It was primarily to avoid such a result that the practice adopted in the present case was inaugurated.

That the evidence of seagoing witnesses is peculiarly liable to be lost, through casualties, through witnesses, especially officers, frequently changing their employment, by accepting promotions, and owing to the uncertainty of the movements of vessels on which they ship, is a matter of general knowledge, and is recognized by the provisions of the statutes for taking depositions *de bene esse* and *in perpetuam rei memoriam*.

It is, perhaps, not improper to state, by way of illustration and argument, that counsel have been informed that not one witness to the matters in issue in the previous case of the *Centurion*, 57 Fed. Rep., 412, was in the ship at the time the final decree in that case was entered.

If, therefore, the Court had declined to entertain the claimants' petition and had left them to their remedy against the charterers by independent suit after decree (*Ocean Co.* v. *Campania*, 134 N. Y., 461; *Churchill* v. *Holt*, 127 Mass., 165; *Johnson* v. *Royal Mail*, L. R. 3, C. P. 38), the labor of tracing those witnesses and obtaining their testimony, if it could have been done at all, would have involved great expense, and necessarily would have taken a long time, during which the shipowners would have been out of pocket the amount recovered from them by the libelants for what has been found, all parties being represented and having produced their evidence, to have been the charterers' neglect. It would have been impossible to take this testimony *de bene esse*, because the independent suit against the charterers would not be brought until the shipowners had been adjudged liable. The only possible way of perpetuating their testimony, would have been to file a bill in equity, an expensive and cumbersome

proceeding, which cannot ordinarily be taken in the short time during which a steamship remains in port.

Under the practice adopted, all the parties took their evidence while the matters in issue were fresh and within the clear recollection of the witnesses; the cause was submitted upon proofs and arguments of the respective parties, and the rights as between all the parties were adjudged in one decree. The charterers having been found in fault, were adjudged to pay the decree, and in case the shipowners had to pay it, they were to have judgment and execution against the charterers for the amount forthwith. If the charterers had been found free from fault, the decree would have prevented any further effort on the part of the shipowners to charge them with responsibility.

The rights of all the parties were in position to be and were speedily and finally determined.

It thus appears that the extension of the 59th rule, to cases of this class, tends to promote the ends of justice.

Is it sanctioned by the practice in any other class of cases, or in any other jurisdiction?

1. *The practice adopted is analogous to the former practice in equity.*

In Story's Equity Pleadings, § 72, the rule as to parties is stated as follows:

"It is the constant aim of courts of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject-matter of the suit, so that the performance of the decree of the Court may be perfectly safe to those who are compelled to obey it, and also, that future litigation may be prevented (*Mitf. Eq. Pl. by Jeremy*, 163, 164; *Id.*, 39; *Cooper Eq. Pl.*, 33; *Caldwell* v. *Taggart*, 1 Peters R., 190; *West* v. *Randall*, 2 Mason R., 190 to 196; *Jog* v. *Wirtz*, 1 Wash. Cir. R., 517; *Holland* v. *Prior*, 1 Mylne & Keen, 240). Hence, the common expression, that courts of equity delight to do justice, and not by halves (*Knight* v. *Knight*, 3 P. Will., 333). And hence, also, it is a general rule in equity (subject to certain exceptions, which will be hereafter noticed), that all persons materially interested, either legally or beneficially, in the subject-matter of a suit are

to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may be a complete decree, which shall bind them all (*Mitf. Eq. Pl. by Jeremy*, 164; *Cooper Eq. Pl.*, 33, 34; *Id.*, 125; *Palk* v. *Clinton*, 12 Ves., 53, 54; *Hickok* v. *Scribner*, 3 John. Cas., 311, 315, 317, 318, 319; *Joy* v. *Wirtz*, 1 Wash. C. R., 517; *Caldwell* v. *Taggart*, 4 Peters R., 190; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. R., 349). By this means the Court is enabled *to make a complete decree between the parties* to *prevent future litigation*, by taking away the necessity of a multiplicity of suits, *and to make it perfectly certain, that no injustice is done, either to the parties before it, or to others, who are interested in the subject-matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits.* When all the parties are before the Court, the whole case may be seen; but it may not, where all conflicting interests are not brought out upon the pleadings by the original parties thereto (West. *v.* Randall, 2 Mason R., 190, 191).

This section cited with approval *Gregory* v. *Stetson*, 133 U. S., 579.

In § 138 Judge STORY further says:

"In the next place, an interest of the absent parties in the subject-matter *ex directo*, which may be injuriously affected, is not indispensable to the operation of the general rule; *for if the defendants actually before the Court may be subjected to undue inconvenience, or to danger or loss, or to future litigation, or new liability, under the decree, more extensive or direct than if the absent parties were before the Court, that itself will, in many cases, as we shall presently see, furnish a sufficient ground to enforce the rule of making the absent persons parties.*"

In § 169 he says:

"It [the rule that all the parties, obligors and obligees, are required to be made parties to a suit] has even been pressed to the extent of declaring that where the bond is several as well as joint, all the obligors, whether principals, or sureties, must be made parties (to avoid circuity of action), because they are not only entitled to contribution but also are entitled to have the assistance of each other in taking the account of what remains due on the bond."

Citing

Madox v. *Jackson*, 3 Atk., 406.

Angerstein v. *Clarke*, 2 Dick., 738; s. c., 3 Swanst., 147.

Cockburn v. *Thompson*, 16 Ves., 326.

Bland v. *Winter*, 1 Sim. & Stu., 246.

In *Robertson* v. *Carson*, 19 Wall., 94, the facts were as follows:

William Carson, by his will, directed his executors to sell all his real and personal property, and after paying his just debts, to hold the residue of the proceeds upon certain prescribed trusts for his widow and two children. The executors were authorized to invest and reinvest, as they should deem best. Under this authority, they sold a large amount of personal property to one Elias N. Ball and took his bond for the proceeds, with William J. Ball as his surety. Upon attaining majority, the children *cestuis que trust* assigned their interest to their mother, the widow, who filed a bill in equity to set aside a certain conveyance of a portion of the real estate, and also "to call Elias N. Ball and his surety (William J. Ball) to account upon their obligation for the proceeds of the personal property," the bonds given therefor remaining unpaid. The parties defendant made by the bill were (so far as touched the personalty) Elias N. Ball and William J. Ball, his surety, but process was returned not found as to Elias N. Ball, the principal. William J. Ball, the surety, took the objection of the absence of his principal by way of answer. But the Court proceeded to judgment against him. This was held error, and that the principal, Elias N. Ball, was a necessary party.

Mr. Justice SWAYNE, in delivering the opinion of the Court, said:

"As to the personalty: the bill does not aver that he (Elias N. Ball) is insolvent, and gives no reason why he should not or cannot be brought before the Court. The answer of William J. Ball takes the objection of his absence, and alleges that he represents the debt to be paid. The surety is entitled to have him present that he may assist in making this defense; that he may assist in taking the account of debts due, if the defense fail; that the decree in that event may be primarily against him for payment, and that the amount may be conclusively fixed for which he will be liable over to the surety, if the latter should be compelled to pay the debt."

In equity new defendants might be introduced by the complainant on an amended or supplemental bill, while

the ordinary course of a defendant at law seeking relief as to the same subject-matter, against other persons not defendants, was by a cross bill in equity filed by himself against the plaintiff, with the additional defendants desired

Mitchell v. *Lenox*, 2 Paige, 280.
Livingstone v. *Gibbons*, 4 John. Ch., 36.
Ensworth v. *Lambert*, *Idem*, 604.
McGowan v. *Yorks*, 6 John. Ch., 150.
Webster v. *Bond*, 9 Hun, 437, 440.

Under the modern Code practice, the Court may direct that additional parties interested in the subject matter be brought into the pending suit.

New York Code Civil Proc., § 452.

2. *It accords with the modern English practice.*

Under the *Judicature Act of* 1873, *Section* 23, *Subd.* 3, it is provided that the courts—

"and every judge thereof shall have power to grant to any defendant, in response to any equitable estate or right, or other matter of equity * * * all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or not, who shall have been duly served with notice in writing of any such claim, pursuant to any rule of court, as might properly have been granted against such person, if he had been made a defendant to the cause, duly instituted against the same defendant for the like purpose, and every person served with any such notice shall thenceforth be deemed a party in such cause or matter."

The many cases cited in the learned brief for the petitioner show that under the rules of court first adopted for the enforcement of this statute, it was the common practice to bring in a third party in any case where the defendant, if defeated, would have a right of action over against such party; but that under a later rule, which is narrower in scope than the statute, it is now the practice to bring in a third party wherever there is any privity of contract or a right to indemnity under express

contract to the defendant from a third party. The purpose of this provision of the Judicature Act and of the rules under it, have been stated by the judges in various cases.

In *Turner* v. *Hednesford Gas Co.*, 3 Exch. Div., 144, 151, BRETT, *L. J.*, said:

"The intention is to settle in one litigation all questions arising out of the subject matter of the dispute."

In *Benecke* v. *Frost*, 1 Q. B. D., 419, 421, LUSH, *J.*, said:

"Undoubtedly, one of the questions is identical as between the plaintiffs and the defendants and between the defendants and Messrs. Thew; that is precisely the case in which third parties are to be cited, so that they may be bound by the decision in the action."

In the same case BLACKBURN, *J.*, said:

"The object of the Act was not only to prevent the same question being litigated twice, but to obviate the scandal which sometimes arose by the same question being differently decided by different juries."

In *Ex Parte Smith*, 2 Ch. Div., 51, 54, MELLISH, *J.*, says:

"There would be risk of the question being decided in different ways in the two proceedings (if the other party were not brought in), which would produce great injustice."

In *Swansea Shipping Co.* v. *Duncan*, 1 Q. B. Div., 664, the plaintiff, owner of the ship *Helen Burns*, chartered to the defendant, sued for 31 days' demurrage for delay in discharging at Leith. The defendant had sold the cargo before arrival, and by the terms of the agreement and according to the custom of the trade the vendee was bound

to indemnify the defendant for any amount he might be charged with, on account of detention of the ship in discharging. The defendant brought his vendee into the suit by a third party notice. *Jessel*, Master of the Rolls, laid down the rule as to the third party intervention as follows (p. 648):

"As to the second point, it is said that the *whole cause of action* between the plaintiff and defendant, and the defendant and the third person, *must be identical;* and on this objection the Court of Queen's Bench seems to have decided against the order. I think the objection cannot be sustained. If the plaintiff objects to the third person being introduced, the Court would consider whether the plaintiff would be prejudiced in any way or delayed in his action by such proceeding. But here the plaintiff makes no such objection. The object of these enactments was to prevent the same question being tried twice over where there is *any substantial question common* as between the plaintiff and defendant in the action, and as between the defendant and a third person, * * * it does appear to me that a material question is common both between the plaintiffs and the defendants, and between the defendants and the third persons, as to whether the ship was discharged as fast as the custom of the port of Leith allowed."

3. *It accords with the practice in countries deriving their procedure from the civil law.*

In the absence of statute in some Continental countries, and under the provision of codes of procedure in others, a person interested in the event of a suit, and who, as plaintiff, would be entitled to bring a further suit upon the same subject matter, or contest his liability in a further suit against him in respect of it, may voluntarily intervene for the protection and determination of his rights, or may be forced to do so by either of the parties to the pending suit.

The doctrine is called, "*Intervention Passive ou Forcée*," "*L'Assignation en Declaration de Jugement Commun*," or, "*La Mise en Cause*."

"*L'Intervention Passive ou Forcée Dite Assignation*

en Déclaration de Jugement Commun" is the subject of a learned essay by Prof. Boneval Faure, of the Faculty of Leyden, in 17 *Revue Critique de Législation, N. S.* (1888), p. 462. In opening the discussion he says:

"Like the French Code, on which it is chiefly founded, the Netherlands Code of Civil Procedure contains no provision in regard to the practice which the French designate by the name of *Demande ou Assignation en Declaration de Jugement Commun*, and which, perhaps, might be called, more shortly, *Intervention Passive ou Forcé*. It consists substantially in that a third party is called into a case pending between other parties in order that the judgment to be rendered *lui soit declaré commun*, that is to say, to make one judgment conclusive as well for him as for the parties (*pour faire qu'un jugement ait force de chose jugée aussi bien pour lui que pour les parties*).

Dalloz, in his "*Repertoire*," *Vol.* 5, *tit.* "*Intervention*," *Sect.* 3, No. 142, states the rule to be that whenever a person who is not made a party to a suit is in position to begin another suit upon the same matter or to contest it again in a further suit against him, the party interested in having the question definitively settled has the incontestable right of bringing such third party into the cause in order that the judgment reached may be conclusive upon him so far as regards points common to the interests of all the parties.

In *Vol.* 6 *of the Repertoire*, *No.* 2203, he states that assurers have an incontestable right to intervene in every judicial proceeding in which the assured is interested.

In the 5th volume (*loc. cit.*) he justifies the principle of forced intervention, by saying: "L'intervention forcé est la conséquence de l'intervention volontaire; les deux droits sont correlatifs."

Rodier, Questions sur L'Ordonnance de 1667, *titre* 11, *art.* 28, *qu.* 1, intimates that this practice is of great antiquity.

Carré and Chauveau, 3 *Procédure Civile*, *No.* 1271, state

the rule substantially as above quoted from *Dalloz*, citing numerous French authors in support of the doctrine.*

The authors point out (p. 163) that in the various *projets* for reformation of the French Code, notably those of 1866 and 1886, express provisions to conform the Code to the practice were incorporated, for the purpose, as stated in the *Exposé de Motifs* which accompanied the proposed revision of 1866, "*of avoiding circuity of action (circuits d'actions), and in consequence to make justice more speedy and less costly.*"

They show that the practice of Forced Intervention prevails also in Belgium without authority of statute (p. 482), being received in its jurisprudence, "*en vertu d'anciennes traditions basées elles mêmes sur l'interet public;*" and that it is a recognized practice in Italy (*Civ. Cod.*, §§ 203–205), and was in Prussia before the Empire (p. 483).

This practice prevails in admiralty cases. A vessel in tow, sued for a collision, took out a forced intervention against its tug, but the Tribunal of Commerce of Dunkerque refused to sustain the intervention. This decision was reversed on appeal, upon the ground that the Chamber of Commerce should have sustained the intervention,

* Their explanation of the theory and practice of Forced Intervention is as follows:

La question que nous venons d'examiner exige que nous fassions connaître ce que l'on entend par demande en déclaration de jugement commun, dans quel cas elle a lieu, quels en sont les effets et la forme.

Cette demande est une action formée contre un tiers, afin de faire prononcer contre lui les mêmes condamnations que l'on poursuit ou qui déjà ont été prononcées contre une autre partie.

Cette demande a conséquemment lieu par rapport à un jugement à intervenir, ou bien par rapport à un jugement rendu.

Dans le premier cas, elle a pour objet de forcer un tiers à se rendre partie dans une contestation pendante entre deux personnes; de sorte que, le jugement à rendre étant prononcé avec ce tiers, celui-ci ne puisse pas ensuite l'attaquer par la voie de la tierce opposition. C'est dans ce cas seulement que l'action forme un incident, en ce qu'elle produit une *intervention passive* ou *forcée* de la partie contre laquelle elle est formée.

Dans le second cas, la demande en déclaration de jugement commun a pour objet de faire prononcer qu'un jugement rendu

declared the captain of the tug and its owner responsible for the consequences of the collision, and directed judgment against them for the damages caused to the plaintiff's vessel, with interest, and with costs to the tow.

Tassino v. Ryffin, Chavet et la Chambre de Commerce de Dunkerque, 1 *Revue Internationale du Droit Maritime*, 117.

The exact point here involved does not appear to have arisen in France, probably because no privilege on a vessel arises from contracts made with charterers.

1 *Valroger, Dr. Mar., No.* 222, *p.* 281.

Voluntary "intervention" (as plaintiff) and "third opposition" (as defendant) is permitted by the Revised Code of Practice of Louisiana to a limited extent (§§ 364, 389, 395, 396, 398), provided the intervention does not unreasonably retard the principal suit (§ 391).

In order to be entitled to intervene it is enough to have an interest in the success of either party to the suit or an interest opposed to both (*Sec.* 390).

---

entre deux personnes aura effet contre un tiers, de même que si ce tiers y avait été partie. Cette demande est principale, et conséquemment elle doit être sujette au préliminaire de conciliation à la différence de la première, qui en est dispensée comme l'intervention.

On a le droit d'exercer cette action toutes les fois qu'un tiers aurait droit de former tierce opposition contre un jugement rendu ou à rendre. C'est ce qui aurait lieu, par exemple, dans le cas où une maison, possédée en indivis par plusieurs personnes, est réclamée par une autre; si celui qui reclame n'a intenté son action que contre l'un des copossesseurs, chacun des autres ayant le droit de se rendre tiers opposant pourrait être assigné en déclaration de jugement commun.

Le Code n'ayant rien prescrit sur les formes à suivre pour former cette demande, il nous semble que, dans les deux cas où elle est formée, elle doit l'être par requête, avec assignation à personne ou domicile, à laquelle on joint copie des titres. S'il s'agit de forcer le tiers à intervenir, il est nécessaire que le libellé de l'exploit lui fasse connaître l'état de l'instance dans laquelle on entend le rendre partie; si, au contraire, l'action est principale, il faut signifier le jugement que l'on prétend faire rendre commun. Du reste, lorsque cette demande est formée incidemment, elle doit être soutenue, contestée et jugée conformément aux règles de l'intervention volontaire (1 *Berriat St.-Prix, Cours. de Proc. Civ., p.* 293).

Forced intervention, under the name of "Demand in warranty," is permitted in real and personal actions where there exists an obligation based on contract to defend another in some action which may be instituted against him, *e. g.*, in real warranty when a purchaser is sued in eviction of an immovable property which has been sold to him, in personal warranty in suits arising upon an obligation which one has contracted to pay the debt or part of one due by another to a third person (*Secs.* 378, 379).

O'Donell v. *Henry*, 44 La. An., 845.
Gilman v. *Pillsbury*, 16 *Idem*, 54
Oliver v. *Bry*, 7 *Idem*, 590.
Keane v. *Huber*, 12 *Idem*, 560.

By section 385 it is provided:

"If the defendant is cast in the action, the Judge, when he gives judgment against such defendant, *must render at the same time a judgment in favor of the defendant against his warrantor* for whatever *indemnity* may be due to such defendant, as well as for all the loss and damage he may have sustained by reason of the action."

The practice of voluntary and forced intervention also obtains in the Procedure of Lower Canada.

Civil Code, §§ 1346, 2062.
Baudry v. *Laflamme*, 7 Mathieu Rapports Judicares (Quebec), 501.
Rose v. *Coutlee*, 10 *Idem*, 258.
Adams v. *Hartford Mining Co.*, 4 Revue Legale, 69.
Stein v. *Bourassa*, 18 *Idem*, 484.
La Banque v. *St. Jean.*, 9 *Idem*, 659.

"Voucher of warranty" existed in the common law to a qualified extent, being limited to real actions where persons sought to be evicted held lands under the usual covenants in deeds. It rested in the discretion of the Court whether the voucher should be allowed. If allowed and the vouchee did not voluntarily appear, a judicial writ

called a *summons ad warrantizandum* issued commanding the Sheriff to summon him.

Co. Litt., 365; *Idem*, 101 b.
Comyn's Digest, Garranty A; *Idem*, Voucher A, 1.
Booth, 43, 46.
2 Saunders, 32, N. 1.
1 Burrows, 253.
Flint *v.* Hill, 11 East., 184.
Stoner *v.* Menham, 2 Exch., 382.

It has been shown that the practice of vouching in third parties now obtains in England in personal as well as real actions.

V.

The petition for the writ should be denied.

New York, December 14, 1894.

CONVERS & KIRLIN,
Proctors in opposition to Petition.

J. PARKER KIRLIN,
Of Counsel.

APPENDIX.

The Alert, 40 *Fed. Rep.*, 836.

(District Court, S. D. New York. November, 1889).

1. Shipping—Damage to Cargo—Libel *in rem*—Third Parties—Charterers—Fifty-ninth Rule.

In an action *in rem* against a chartered ship for negligent damage to cargo, the charterers may, on the claimants' petition showing cause therefor, be made parties defendant, on the analogy of the case of *The Hudson*, 15 *Fed. Rep.*, 162, and of Rule 59 in Admiralty.

2. Same—Practice—New Remedies.

It is the duty of courts of admiralty, under their inherent and statutory powers, to adapt their practice and proceedings to new emergencies, so as to secure, as far as possible, the speedy, complete, and convenient administration of justice.

In Admiralty. On motion that charterers be made co-defendants with the ship.

North, Ward & Wagstaff, for libelant.
Goodrich, Deady & Goodrich, for claimants.
R. D. Benedict, for charterers.

BROWN, *J.*—*The Alert* was a chartered ship, and being sued *in rem* for negligent damage to cargo by the breaking of her tackle while discharging under the charter, her owners in their answer say that the tackle was furnished either by the shipper or by the charterers under a special agreement between them, and not by the ship, and they now move that the charterers be made co-defendants. Unless this is done, there may be three independent suits on the same question. Most of the considerations mentioned in the case of *The Hudson*, 15 *Fed. Rep.*, 162, are applicable, and I think the motion should be granted upon the analogy of that case, and of the fifty-ninth rule in admiralty. In several instances where the language of that rule was not literally applicable, it has been applied by analogy where the same or similar reasons have existed for its application, and where no substantial harm could arise therefrom to the plaintiff. The defendants must, of course, give the necessary additional stipulations for costs, both to the libelants and to the new parties brought in.

On Reargument on Exceptions.

(January 15, 1890.)

The charterers having been served with process, have appeared specially, and upon exceptions moved to set aside the process issued against them as unauthorized. Subsequent reflection confirms my judgment of the propriety of the order heretofore granted. Its propriety does not depend upon the form of the action, whether it be in contract or in tort, but on the essential reasons for it, viz., the due administration of justice; to prevent circuity of action and a multiplicity of suits upon the same question; to secure a thorough hearing upon full evidence as to the facts; to prevent diverse or contradictory decisions upon the same object, involving, necessarily, injustice to some of the parties. The difficulties in the way of such a procedure as the present, in cases arising on contract, where the third parties brought in may be liable to indemnify the others, are less than in cases of tort, where, for the most part, there is no right to compel contribution. The case of *The Hudson*, *supra*, was based upon the existence of such a right upon the facts as stated in the petition. The papers on which the present order against the charterers was issued show that the contract sued on was the charterer's contract. The libel is for damages upon the breach of this contract, through a negligent delivery of cargo. The charterers were in possession of the ship; they were the owners *pro hac vice;* they were the principals in the contract. The bill of lading was their obligation, not that of the master, who protested against such cargo, and no fault appears in the ship or master. The owners of the ship, who have been obliged to interpose as claimants to prevent the sacrifice of their property, and the master, are under no personal responsibility. They are strangers to the contract sued on, and without any certain means of ascertaining the facts, or producing the evidence of them. Upon the case, as thus far presented, if the ship is liable, the charterers are also liable, and bound to indemnify the claimants. Yet the claimants, if defeated in this suit, when they sue the charterers for indemnity may be again defeated through the differ-

ence in the proofs; and the libelants, if defeated here, may again sue the charterers. If the charterers admitted their obligation to indemnify the claimants for the results of the present action, or if there were any express contract imposing this obligation on them, the need of such an order as the present would be less, since notice to the charterers of the pendency of this action, and an opportunity to defend it would bind them by the result (*Chicago City* v. *Robbins*, 2 *Black*, 418; *Clark* v. *Carrington*, 7 *Cranch*, 308; *Village of Port Jervis* v. *Bank*, 96 *N. Y.*, 550, 557; *Heiser* v. *Hatch*, 86 *N. Y.*, 614; *Dubois* v. *Hermance*, 56 *N. Y.*, 673; *Kouitzky* v. *Meyer*, 49 *N. Y.*, 571); though this would not prevent the injustice to the shipowners of being compelled to pay the damages on the charterers' contract before the latter were called on for payment.

The charterers, however, do not admit their liability to indemnify the shipowners. There is no express contract covering the point. The obligation of the charterers to indemnify is directly involved in the question to be tried in this suit, viz., whether the charterers agreed to supply the tackle, and depends on the same evidence. The charterers, if not made parties now, might litigate the same question anew in any subsequent suit (*Chicago City* v. *Robbins*, 2 *Black*, 418, 423). Under the former practice in equity, the charterers would be brought in as defendants as a matter of course. Under the present practice in England, since 1873, the introduction of third persons in such cases is in the ordinary course of precedure, even in common law suits (*Benecke* v. *Frost*, *L. R.*, 1 *Q. B. Div.*, 419; *Fowler* v. *Knoop*, 36 *Law T. R.* (*N. S.*), 219; *Coles* v. *Association*, *L. R.*, 26 *Ch. Div.*, 529; *Carshore* v. *Railroad Co.*, *L. R.*, 29 *Ch. Div.*, 344; *The Cartsburn*, *L. R.*, 5 *Prob. Div.*, 35, 59).

The present case could not arise in England, since no suit *in rem* lies there for breach of a contract of affreightment. The remedy would be only against the charterers personally. In France there is no privilege on a chartered ship for breach of a contract not made either with the master or the owners, but made with known charterers in possession of the ship (1 *Valroger*, *Droit*

Mar., 281; *Court of Cassation, Dall.*, 1845, *Part I.*, 279). And aside from that where a maritime claim is sought to be enforced through a suit against the master (as the practice in Europe generally is, not, as with us, by a suit *in rem* directly against the ship alone), if the principals are not made co-defendants in the first instance, they may be brought in, if within jurisdiction, upon the master's suggestion (1 *Rev. Int. du Droit Mar.*, 118, 556; *The Gyptis*, 2 *Id.*, 182, 664; *Blondiaux* v. *Pavot*, 4 *Id.*, 22). And more broadly still, in the enforcement of civil rights, generally, in the majority of European countries, the practice by what is termed "*L'assignation en declaration de jugement commun*," or more briefly, "*Intervention passive ou forcée*," or "*La mise en cause*," permits the defendant, in the absence even of any express provisions of the Codes, to bring into the cause any third person who might afterwards litigate the same question with the defendant, and who ought to be bound by the judgment, but who, if not in the case, might dispute its validity as to him (3 *Carre et Chauv., Proc. Civ. Qu., p.* 1271, and note; 1 *Berriat St. Prix Cours de Proc. Civ., p.* 293). Dalloz says this right is incontestable, and founded on necessity and the nature of things (*Repertoire, Vo.* "*Intervention*," *Sec.* 3, *No.* 142; *Bonnier, Elm. Proc., No.* 723; *Italian Civil Code, Secs.* 203–205; *Sebire et Carteret, Biblioteca del Diritto, tit.* "*Intervento*," *Art.* 2, *Sec.* 38. See 17 *Revue Critique de Leg.* (*N. S.*), 462).

In the present case the charterers, as I have said, are the principals. If there is any liability, they are liable, and liable to indemnify the ship; and whether there is any liability cannot be determined as to them without their presence. If the maritime law and the practice of this country allow a suit *in rem* on the contract of known charterers solely, there is no lack of power in the Court to regulate its procedure so as to promote speedy and substantial justice. Both the statutes and the admiralty court rules, in cases not provided for, authorize the Court "to regulate its practice as is fit and necessary for the advancement of justice" (*Rev. St., Secs.* 913, 918, *Rule* 46; *The Hudson*, 15 *Fed. Rep.*, 175). This authority is a power held in trust for the benefit of litigants, and it is the duty

of the Court to exercise it in proper cases by adapting its procedure to the practical needs of justice. On this point *Benedict, J.*, in the case of *The Epsilon*, 6 *Ben.*, 378, 389, says:

"The admiralty creates its own forms of proceeding, and adapts methods of its own to the varied necessities which present themselves to its consideration. The power to do this is part, and the important part, of the jurisdiction of the admiralty. 'The principles, rules and usages which belong to courts of admiralty' (Process Act, 1792) enable these courts to work justice between man and man with celerity and economy. They accomplish this by ways unknown to other courts, and for many of which it were vain to look in any statute. Stripped of the power to pursue these methods, there would be little left to distinguish a court of admiralty from a court of equity or of law. * * * When cases arise which have not been provided for in the rules prescribed by the Supreme Court, the District Courts as the only courts of original jurisdiction in admiralty, have the power, and are bound to devise modes of proceeding which shall enable them to carry into effectual execution any law which they are called to administer."

The case of *The Hudson*, *supra*, and the fifty-ninth rule in admiralty, though not literally applicable, furnish also an analogy for this order. A similar practice has been occasionally followed, where necessary, in cases not literally within the rule (*The City of Lincoln*, 25 *Fed. Rep.*, 835; *The John Cottrell*, 34 *Fed. Rep.* 907; *The Doris Eckhoff*, 32 *Fed. Rep.*, 555; *Joice* v. *Canal-Boats*, *Id.*, 553). This case is one in which the libelants may proceed *in rem* and *in personam* in the same action, under the long-standing practice of this circuit (*The Monte A.*, 12 *Fed. Rep.*, 336, 337, *and cases there cited*; *Joice* v. *Canal-Boats*, 32 *Fed. Rep.*, 554). He might, therefore, originally have made both the ship and the charterers defendants. He should not be suffered to proceed capriciously against one only, to the certain prejudice of the other. This can be remedied by the joinder of the charterers as defendants now; and this will create no material embarrassment or inconvenience to the libelant. It is the charterers who have brought the ship into this situation. It is their contract

that is sued on. It is they who have the means of defense, if there is any defense; and it is they who ought to pay, if there is anything to be paid. I have no doubt of the authority of the Court to bring in the charterers as defendants. To refuse to do so, under such circumstances, would, it seems to me, be a denial of justice. The motion to set aside the additional process is therefore denied. The process should require the defendant to answer the libel and petition, and the petition should set forth all that is needed in connection with the libel to constitute a cause of action against the charterers.